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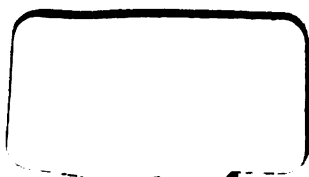
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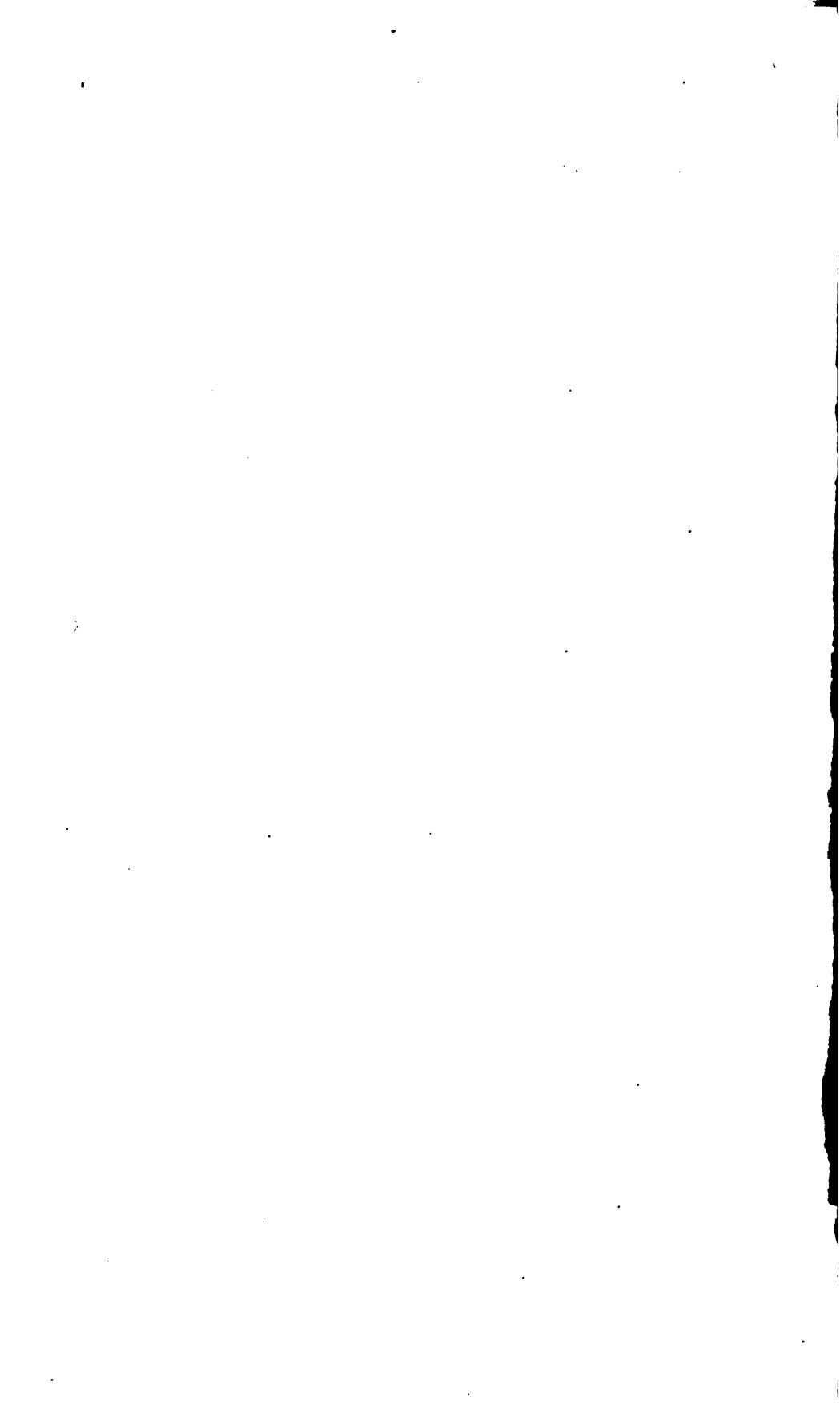
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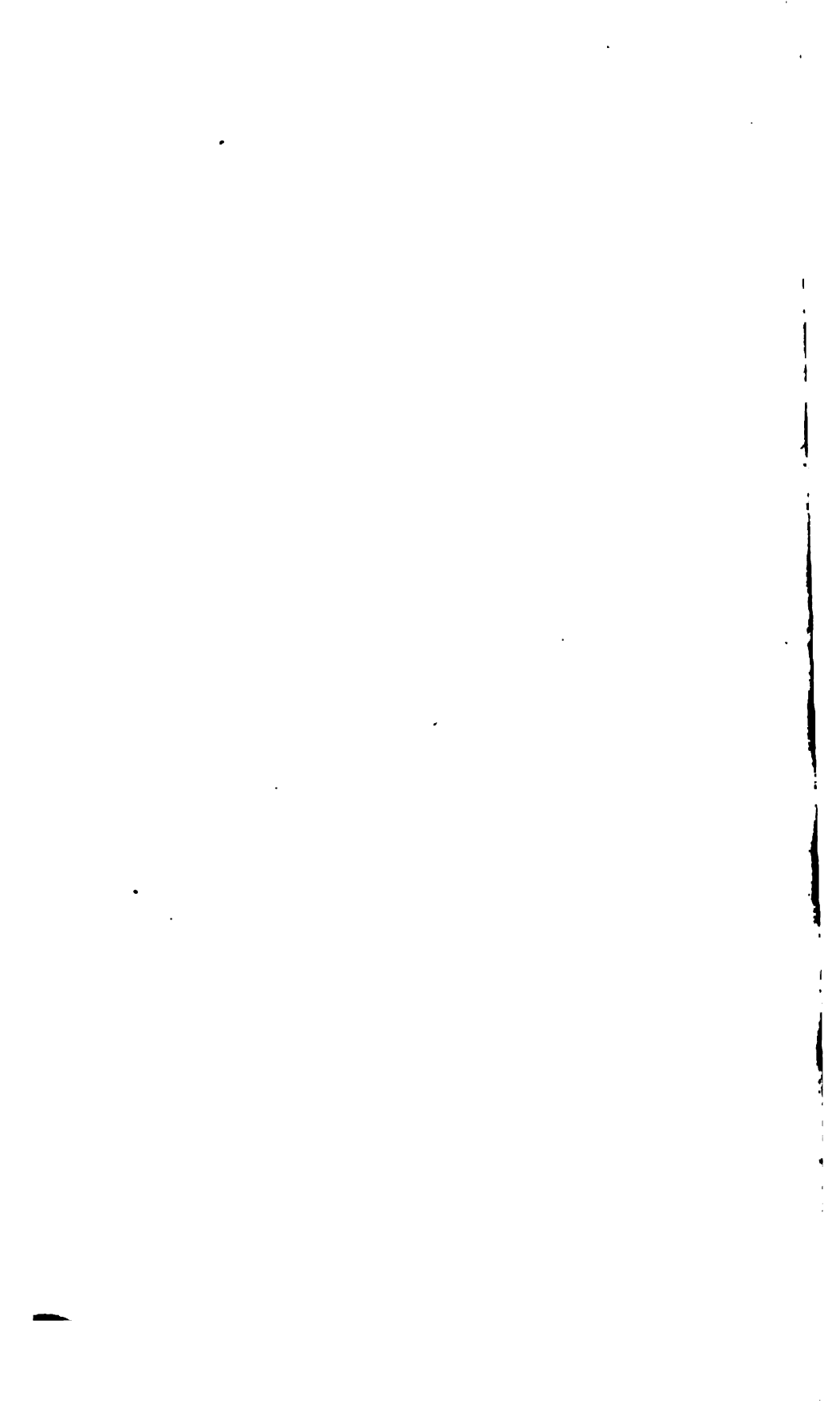


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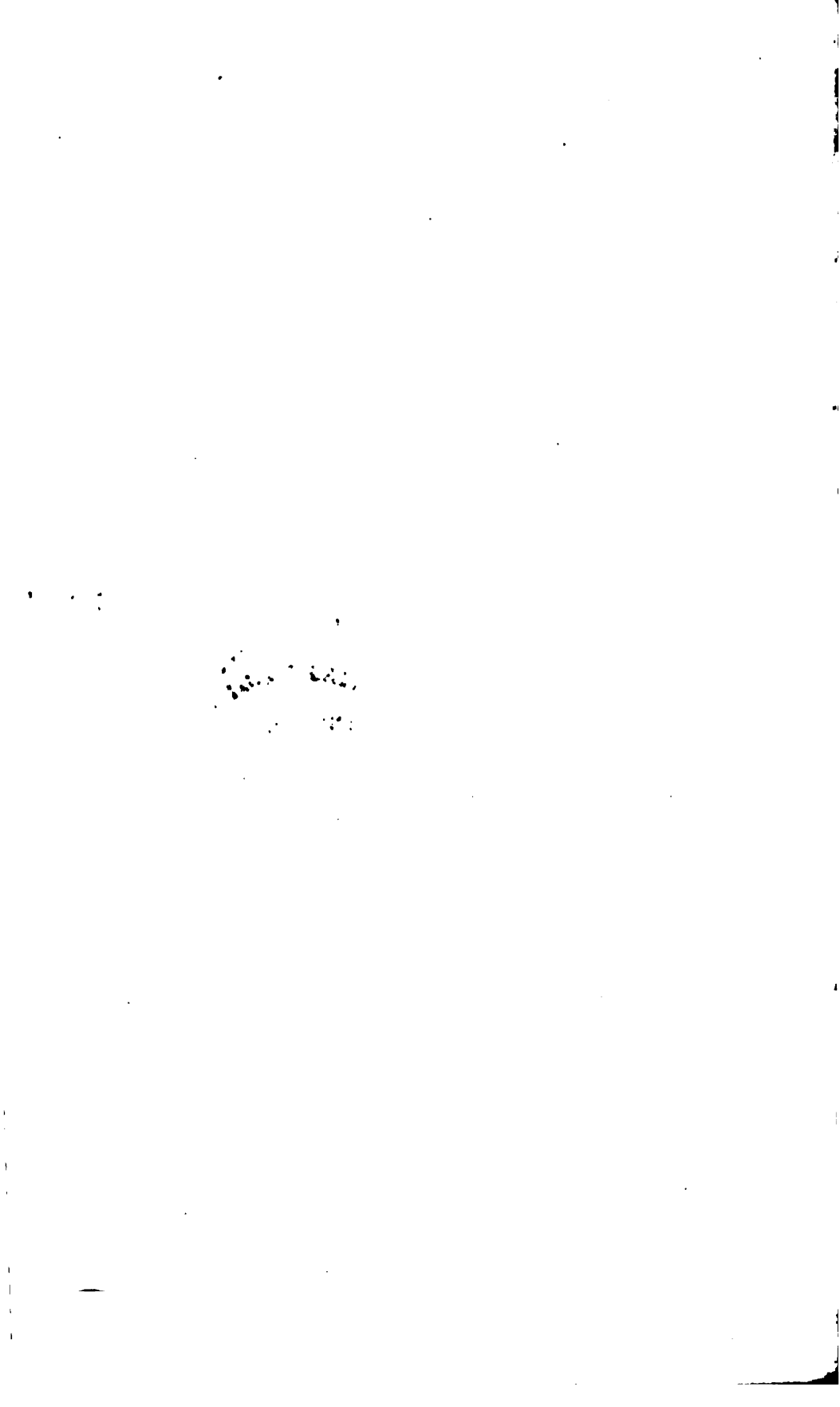
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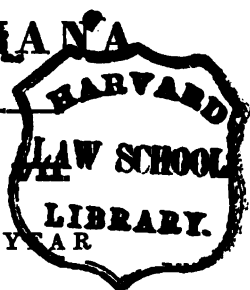
REPORTS
OF
CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT

LOUISIANA

VOLUME VII

FOR THE YEAR

1852.



W. M. RANDOLPH, REPORTER.

[W. W. KING, Esq., late Reporter, prepared this volume to the case of *Calmes v. Stone*, on the 133d page.]

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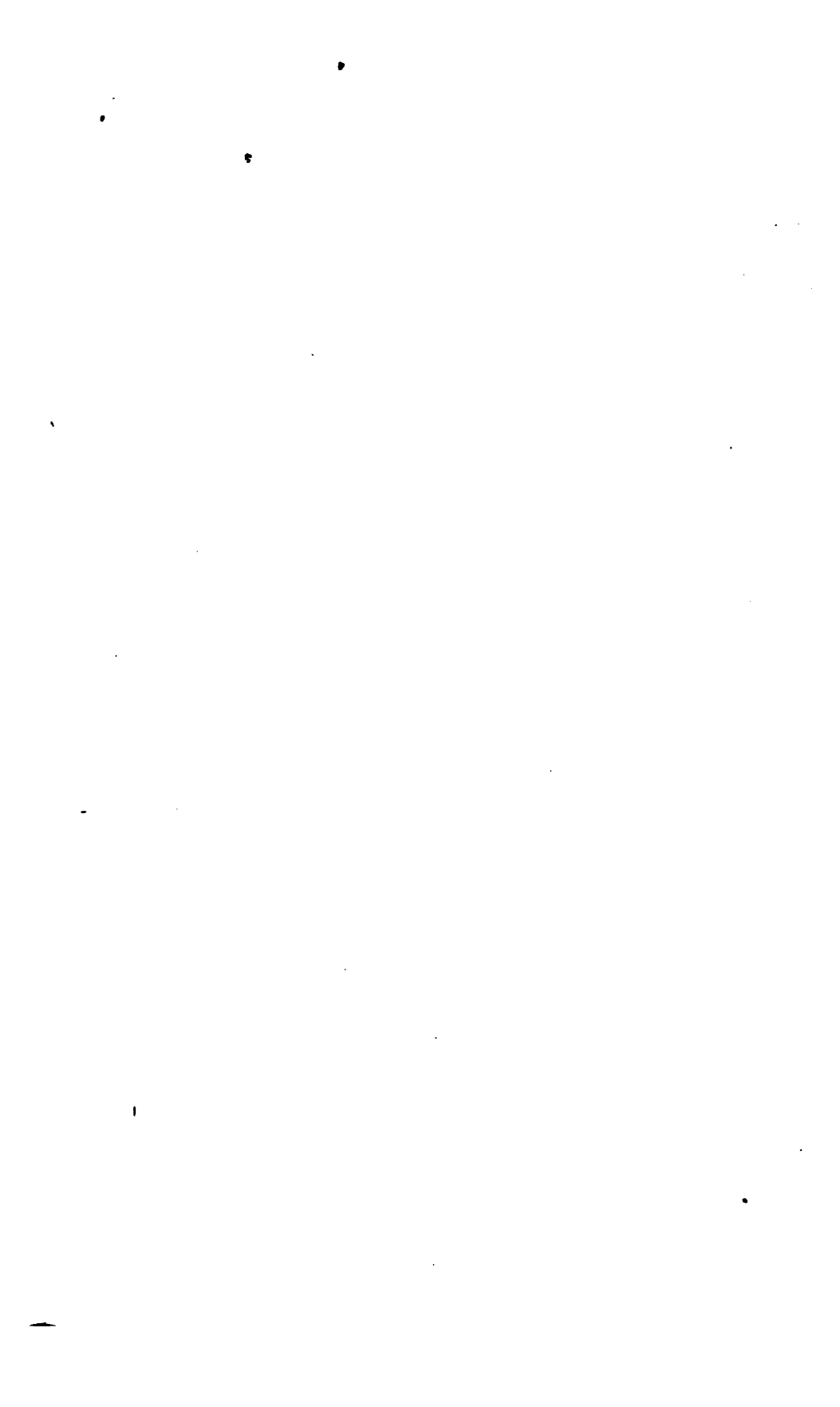
JUDGES
OF THE
SUPREME COURT,

DURING THE TIME OF THESE REPORTS.

HON. GEORGE EUSTIS, *Chief Justice.*

HON. PIERRE ADOLPHE ROST,	}	<i>Associate Justices.</i>
HON. THOMAS SLIDELL,		
HON. ISAAC T. PRESTON,		
HON. WILLIAM DUNBAR, <i>Succe-</i>		
<i>ssor of the Hon. I. T. Preston.</i>		

~~~~~  
**ATTORNEY GENERAL,**  
**ISAAC JOHNSON.**



## PREFACE.

---

THE undersigned received the appointment of Reporter late in June, 1853. There had accumulated, at that time, Decisions unreported from about the middle of March, 1852, making a period of more than fifteen months. His labor commences at the case of *Calmes v. Stone*, p. 133 of this volume.

The volume for 1853, will be published within about thirty days—not more than forty or fifty cases remaining to be set up. The Reporter hopes to give to the Bar, the Decisions for January, February and March, 1854, by the first of August, and will be, very shortly after the 1st of January, 1855, up with the Court.

So much matter was on hand at the time of his appointment, that he thought it hardly worth while to publish the back work in numbers—the more particularly, as he was informed by the Agent for their sale, that the demand for the Decisions in that form was very insignificant. The Reporter hopes that the large amount of work will be a sufficient apology for the apparent delay in publication. Few persons, not familiar with the drudgery of proof-reading, can form a distinct idea of its annoyances. There can be no doubt, that whatever gifts “come by nature,” correcting proof is not one of the number.

In all cases, whenever practicable, in making the abstracts of points decided, the language of the Court has been adopted. In a very large number of cases, the facts are stated to which the law has been applied, no attempt being made to generalize a principle from the decision, when the Court has not announced such a generalization,. This has greatly increased the labor; but it has, he trusts, secured accuracy.

The records of the Opelousas Term have never been received. The Clerk of the Supreme Court for the Opelousas District, sent them by steamboat to New Orleans, but nothing has been heard of them. No blame is attributable, it is believed, to the clerk; and no efforts have been spared by him, or the undersigned, to recover them.

In making up the Index of points decided, it has been thought best not to multiply heads. Subdivisions are very useful, where a large number of cases are to be digested; but for the cases contained in a single volume, they confuse, rather than simplify.

The typographical arrangement of the Index, it is believed, will facilitate the reader, and for that reason it has been adopted. The numbers to which references are made, refer to like numbers in the Index, and to the paging, so that the reader can consult either the abstract in the Index, or the case in the body of the volume.

The volume has been published under the contract made by the late Reporter.

W. M. RANDOLPH.



The consideration in which the late Mr. Justice PRESTON was held by the Bench and the Bar, and their keen appreciation of his death, will appear from the following Tribute to his Memory.

---

## SUPREME COURT OF THE STATE OF LOUISIANA.

The Court met Monday, December 6, 1852. Present, their Honors *George Eustis*, Chief Justice, *P. A. Rost*, *Thomas Slidell*, and *William Dunbar*, Associate Justices.

On motion of the Honorable *Isaac Johnson*, Attorney General, it is ordered, that the following proceedings of a meeting of the members of the bar, held on the 9th of July last, on the occasion of the death of the Honorable ISAAC T. PRESTON, one of the Judges of this Court, be spread upon the minutes of the Court, viz :

"At a meeting of the members of the Bar of New Orleans, held in the Supreme Court room, to take measures to pay an appropriate tribute to the memory of the Honorable I. T. PRESTON, one of the Judges of the Supreme Court of this State, who was killed by the explosion of the steamboat *St. James*, on the morning of the 5th of July last,

"On motion of *H. R. Denis, Esq.*, *M. M. Cohen, Esq.*, was called to the chair, and *John Claiborne, Esq.*, was appointed Secretary.

"*Mr. Cohen*, on taking the chair, made a very feeling and appropriate address.

"After which, the Attorney General, the Honorable *Isaac Johnson*, offered the following Resolutions, which he preceded with a brief but eloquent tribute to the deceased :

"The last tribute which friends can pay to departed worth, is to unite in the expression of their common sympathy, and recall to memory the virtues of him they will see no more. Such is the occasion of our present meeting. One of us, with whom we have been familiar for years, who has been the companion of the old, and a bright and illustrious example to the young, has left us forever. The affliction to his family and friends was not alleviated by the sad consolation of ministering to his last wants on the quiet bed of death ; but he has been torn from them, by a sudden, terrible, and ruthless blow, which overwhelms even grief, and leaves nothing but blank despair. After such a calamity, it becomes a solemn and mournful duty of the friends and associates of the departed, to offer a public testimonial of their appreciation of his high qualities, not only as a joint tribute to his worth, but in the hope that such an expression of their sympathy may, in some slight degree, console the grief of his family.

"The life of our departed friend, ISAAC T. PRESTON, from his youth to age, has been passed among us. He has exercised, during his whole career, a powerful influence over the public councils. He has filled numerous high offices, and ever performed their duties with untiring zeal and energy, with honor to himself and profit to his country. He was distinguished in his career at the bar, by an impressive and ingenious eloquence which seldom failed in effect, because it always bore the stamp of sincerity, and the vigor of a powerful and earnest character.

"In all the private relations of life, he was admirable. The most disinterested and generous of friends ; and as a brother, a husband and a father, he always brought to the domestic circle, the warm gushings of a generous heart, shedding around him happiness and pleasure.

"We deeply and sincerely sympathize with his family in their dreadful and deplorable loss, and we beg them to accept this expression of our regret,

## SUPREME COURT OF THE STATE OF LOUISIANA.

" We deplore the loss which the public has sustained in the eminent, distinguished, and zealous magistrate, whose warm and generous impulses, if they sometimes led him aside from the exact letter of the law, were always attracted by what he believed to be the honest justice of the cause.

" We respectfully request the Attorney General of the State, to present this expression of our sympathies to the Supreme Court, of which the deceased formed a part, and an ornament, and to ask that it be spread upon the records.

" We respectfully invite the conductors of the press, to give publicity to our Resolutions."

The tribute, moved by the Attorney General, was adopted. It was further resolved, to present a copy of it to the family of the deceased; and it was further resolved, that the members of the Bar wear crape for thirty days, and that the Chamber of the Supreme Court be draped in mourning for the same period.



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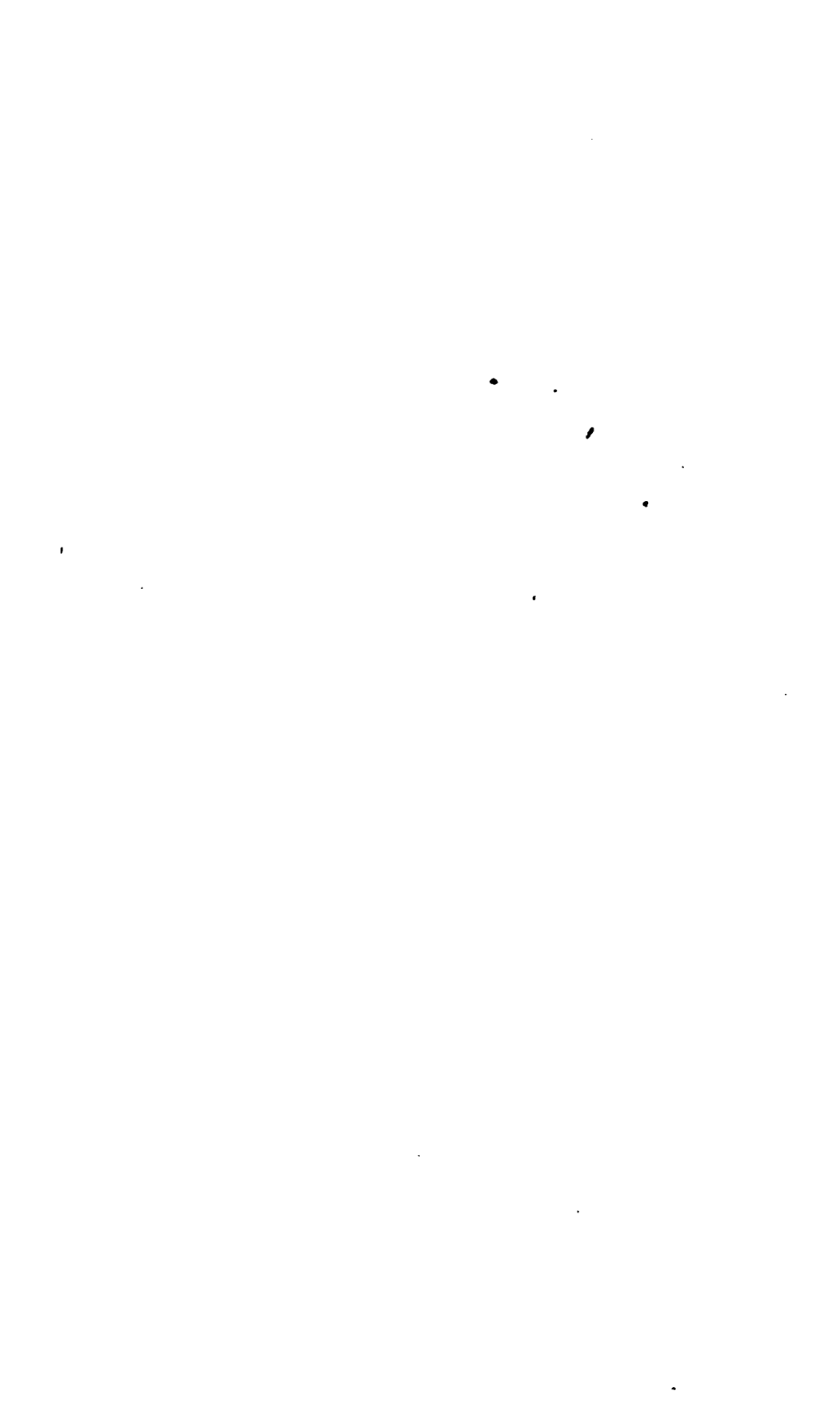
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**CASES**  
 ARGUED AND DETERMINED  
 IN THE  
**SUPREME COURT OF LOUISIANA,**  
 AT  
**NEW ORLEANS,**  
 FROM THE  
**1st of JANUARY to JULY, 1852.**

PRESENT:

Hon. GEORGE EUSTIS, *Chief Justice.*

Hon. PIERRE ADOLPHE ROST,  
 Hon. THOMAS SLIDELL,  
 Hon. ISAAC T. PRESTON, } *Associate Justices.*

JAMES BECK & Co. v. BRADY, BROWN & Co.

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The law gives an attaching creditor the right of being paid, by preference, over other ordinary creditors, out of the proceeds of the property attached, and this right cannot be defeated by a subsequent seizure on execution.

**A**PPEAL from the Second District Court of New Orleans, *Lea, J. Benjamin and Micou*, for plaintiffs. *C. Maurian*, for defendants. The judgment of the court was pronounced by

PRESTON, J. The plaintiffs issued an attachment against the property of the defendants, who are non-residents. Subsequently, other creditors issued attachments against the same property, obtained judgments and seized the property attached under executions, before the plaintiffs obtained judgment or issued execution.

The property having been sold by the sheriff, the plaintiffs took a rule on the other attaching and seizing creditors, to show cause why they should not be paid the amount of their judgment and execution, by priority, out of the proceeds of the sale, as the first attaching creditors.

The other creditors claim a privilege on the proceeds of the property sold, because they first seized it under execution, which, by the very terms of article 722 of the Code of Practice, gives them a privilege upon the property thus seized, which entitles them to a preference over the plaintiffs, who, they contend, are ordinary creditors, their attachment giving them no privilege.

BECK  
v.  
BRADY.

Their counsel admits, that the general impression of the bench and bar has been, that the first attaching creditor is to be paid out of the property attached, before a creditor subsequently seizing the property under execution. The general impression existing for a length of time with regard to the effect of statutes, is generally correct. *Communis error facit jus*, may, at least, justify the position that the common interpretation of laws is right.

The counsel also admits, that a principle adverse to that which he maintains, prevails in those systems of law from which we have borrowed the writ of attachment. He should, therefore, justify his adverse position by express law, or a well settled course of decision.

But, on the contrary, the district court has examined, with great care, all the decisions of the Supreme Court on the question, which are numerous, and has reconciled them all as concurring in the principle, that the first attaching creditor cannot be deprived of the benefit of his attachment, merely by a subsequent seizure, under execution, without any other lawful cause of preference. The apparent, though not real, discrepancies in some of those decisions, arises from the different circumstances under which the cases were presented, and in consequence of the court, at different times, giving different reasons for substantially the same principle. The opinion, however, of this court, in the case of *Tufts v. Carradine*, 3d Ann. 430, and of the late Supreme Court, in the case of *Emerson et al. v. Fox et al.*, 3 L. R. 183, are explicit on the question under consideration, against the pretensions of the appellants, and even if the question could still be considered an open one, would command our unqualified approbation.

Strictly speaking, as contended by the counsel of the appellants, an attachment gives no privilege upon the property attached, for it may be dissolved, the property, bonded or otherwise, relieved from the attachment.

The Code of Practice, however, gives the following effect to a writ of attachment: The sheriff must seize and detain so much of the debtor's property, as may be equal in value to the amount claimed in the suit. Art. 256. He must take charge and keep possession of all the goods and effects which he may have attached (art. 257); and the plaintiff may, after other proper steps, procede to obtain judgment, and, on execution of the same, have so much of the property attached sold, as will suffice to satisfy his judgment. Art. 265. The preceding article, 264, is equally explicit to the same effect.

Now, all his diligence in ascertaining and establishing the grounds for his attachment; in searching out and, as in this case, by an expensive suit, attended with some risk, subjecting property fraudulently covered from creditors by a fictitious sale; in going through a tedious and expensive suit to establish his claim and obtain judgment, would be nugatory, if another creditor, during the delay, might step in and take the property attached by an execution, and obtain payment by privilege, without any other cause of preference than the seizure. The law never intended such an absurdity. In this case, the plaintiffs, though they sued and attached first, would have to give up the property and go to New York to sue, after all their expense and trouble, which would inure to the benefit of those who sued and attached last, instead of subjecting the last to the necessity of seeking their claim abroad. The sense of right implanted in every bosom, would repudiate such injustice.

The true principle is this: that the creditor who is most diligent and uses the process of law to secure his rights, cannot be deprived of the beneficial effects



of that process, by one less diligent in using it. One who has no better right at the time, that is no privilege, mortgage or lien, cannot subsequently acquire either, so as to defeat the process of law in his favor. He does not claim a privilege strictly so called, but that the beneficial effects of the process of law in his favor, should not be rendered nugatory by process subsequently issued in favor of another ordinary creditor; or, which is the same thing, by a privilege subsequently acquired by mere process of law.

The principle may be illustrated by reference to another provision of our code. Payment to the prejudice of an attachment cannot be made. Now, the creditor by execution and seizure, acquires the rights of his debtor upon the property seized, and no more. But the debtor could not dispose of the property for payment, to the prejudice of the attachment, and therefore his creditor cannot, by seizing and selling it, take the proceeds to the prejudice of the attachment.

It is strenuously contended, that the French text of article 724 of the Code of Practice, conflicts with our view of the effect of articles 264 and 265 of that code. If so, we would say with the late Chief Justice Martin, in the case of *Emerson v. Fox et al.*: "We cannot allow it to prevail in a manner that will contradict the evident and manifest intention of the Legislature, in these two articles, and enable the defendants to destroy the effect of the attachment."

So, also, if the effect given to these articles conflicts, as contended, with the provision of the Civil Code, that causes of preference in payment cannot exist unless allowed by that code, we should consider that the articles of the Code of Practice should prevail over the Civil Code, because subsequently adopted.

The judgment of the district court is affirmed, with costs.

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### GUSTAVE RIVARDE et al. v. A. ROUSSEAU, Syndic.

A member of a commercial firm bought real property in his own name, for which he paid in a note of his firm. He afterwards sold the lot to a third person. The other members of the firm brought suit against the syndic of the purchaser to recover their virile shares, upon the ground that the act of sale showed the property was paid for by the firm, and belonged to the firm jointly, and that it could not be legally sold by one of the partners.

*Held*: That the recital in the act of sale was not sufficient notice to the purchaser to invalidate the sale.

**A** PPEAL from the Third District Court of New Orleans, *Kennedy, J., Hamner and Hays*, for plaintiffs. *T. W. Collins*, for defendant. The judgment of the court was pronounced by

*ROSE, J.* The late *Achille Rivarde* purchased a house and lot from the firm of *Samuel Smith & Co.*, and gave in payment a mortgage note belonging to *A. Rivarde & Co.*, a firm composed of himself and the two plaintiffs; and, subsequently, sold the said property for cash to one *Berniaud*, who is now an absconding debtor represented by the defendant, the syndic, appointed by his creditors.

The plaintiffs claim, each, one undivided third of the lot, on the ground that it was acquired with partnership funds; that *Berniaud* was aware of this fact when he purchased, and is subject to all the equities between them and his vendors. There was judgment in their favor, and the defendant appealed.

RIVARDE  
v.  
ROUSSEAU.

The only evidence adduced to show that *Berniaud* had notice that the lot had been acquired by partnership funds, is a reference in the act of sale from *Rivarde* to *Berniaud*, to the act of sale from *Samuel Smith & Co.* to him, passed before another notary of this city, in which that fact appears. The district judge, relying on the authority of the case of *Carian v. Rieffel*, 2 N. S. 619, considered this sufficient to affect *Berniaud* with notice.

The two cases are by no means analogous. In the case of *Rieffel*, he was charged with the fraudulent concealment of a mortgage on a slave he had sold, and the object of the suit was to rescind the sale. The court held, that as the act of sale to the defendant contained an express mention of the mortgage complained of, the reference to that act in the deed of sale between the parties, placed it fully within the knowledge of the plaintiff for the purpose of examination, and was inconsistent with the alleged intention of the defendant to conceal the existence of the mortgage. But in this case, the district judge has gone further and decided, not that the means afforded to obtain knowledge destroy any recourse against the vendor founded on concealment, as in *Rieffel's* case, but, that the means to obtain knowledge, are equivalent to actual knowledge on the part of the purchaser.

Parties are presumed to be in good faith until the contrary is shown, and to destroy that presumption, it is not sufficient to prove that the vendee had the means of acquiring knowledge of the defect in his title; it must further be shown, that he availed himself of them, and that in the present case, for instance, he followed up the reference in his title, by an examination of that of his vendor.

This case is, in all respects, similar to those of *Fletcher et als. v. Cuvelier*, 4 L. R. 274; and *Moran's Heirs v. The Mayor et als.*, 5 L. R. 243.

It is therefore ordered, that the judgment in this case be reversed, and that there be judgment in favor of the defendant, with costs in both courts.

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47 895

### F. B. CONRAD, Assignee, v. CITY BANK OF NEW ORLEANS.

Where a bank had discounted a note for the maker, on a pledge of stock, and the maker subsequently took the benefit of the bankrupt law of the United States, the bank had the right to charge interest after the maturity of the note, without proof of protest, as demand under the circumstances would have been useless.

**A**PPEAL from the Third District Court of New Orleans, *Kennedy, J. M. M. Cohen*, for plaintiff. *L. Hinton*, for defendant. The judgment of the court was pronounced by

PRESTON, J. In 1842, *Thomas Banks* obtained a loan of \$17,250 from the City Bank of New Orleans, for which he gave his note, payable in sixty days; and to secure the payment of the same, executed a pledge on three hundred and forty-five shares of the stock of the bank belonging to him.

The same year, *Banks* applied for the benefit of the bankrupt act of the United States, and made an assignment of his property for the benefit of his creditors. The plaintiff was appointed his assignee, and in July, 1845, caused the stock to be sold. The bank became the purchaser, and paid the plaintiff the proceeds of the sale, deducting the amount of the note with six per cent interest, from its maturity, until the day of sale.

The plaintiff denies that any interest was due, because the note was not protested, and sues for the amount of interest deducted.

CONRAD  
v.  
CITY BANK.

The declared bankruptcy of *Banks*, and assignment of all his property for the benefit of his creditors, rendered it useless to demand payment from him; and as the assignee had no means to pay the debt, except by the sale of the pledged stock, it was equally unavailable to make a demand from him; and a protest of the note was unnecessary, as it was not endorsed. And yet, the creditor should not lose his interest, on account of the inability of the debtor or his assignee, to pay the note at maturity, or the neglect of the latter to sell the stock. The inutility of demanding payment, afforded ample reason for dispensing with that vain form, without losing any thing by so doing.

Now, it is to be considered that the very object of the creation of the bank was to obtain interest by the loans of money. In borrowing money from a corporation created for that purpose, the borrower must be considered as binding himself by an implied agreement, that if the principal was not paid at the term fixed, it should continue to bear interest until paid.

It is so important to a bank to realize its loans at maturity, that in some charters, greater interest is imposed as a penalty for the default of the debtor, as is the case in the charter of the Union Bank. For the same reason, by other charters, the banks may allow interest upon deposits, so as to bank upon other funds than their capital, the active use of both aiding their prosperity. From such considerations it is clearly inferred, that if money loaned by them at interest, is not paid at maturity, they expect interest until it is paid. So the borrower would not think of claiming a delay of payment beyond the term agreed, without allowing the interest at the rate stipulated. And if, at the time of contracting the loan, there were a different understanding between the parties, it would lead to the necessity of rigorous, perhaps ruinous measures, to compel payment as soon as the money became due.

The failure to pay the loan, or to compel it at the term stipulated, may then equitably be considered a tacit renewal of the loan until the debtor pays, or the bank takes steps to enforce payment. And surely, the debtor should be the last to complain, as the failure is his fault, and it is even a favor to him not to spread it on the public records, at his expense, by a protest.

During all the delay in realizing payment by the sale of the stocks, the bankrupt being unable to pay, they were producing dividends, and appreciating in value. If the bank was well managed, and we have no evidence to the contrary, and this for the benefit of the creditors, equity then imperatively demands that interest on the debt, during the same period, should be allowed to the bank.

The claim of the plaintiff is therefore inequitable, and we cannot say that any law or adjudged case requires its allowance.

The judgment of the district court is reversed, and judgment rendered for the defendant, with costs in both courts.

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M. A. FABRE v. WILLIAM T. HEPP.

APPEAL from the Third District Court of New Orleans, *Kennedy, J.*  
Julien Seghers and L. Janin, for plaintiff. *L. Pierce, C. Roselius and G.*

FARRÉ  
v.  
HEFF.

*Schmidt*, for defendant. The opinion of the court (*Eustis*, C. J., absent, and *Slidell*, J., dissenting,) was pronounced by

ROST, J. This is an action of mortgage, in the case of the *Bank of Louisiana v. Delery et al.*, 2d Ann. 648. The third opposition of the plaintiff in the present suit was dismissed, and he was left to his recourse in a direct action. We then held, that the probate sale made to affect a partition of the property, composing the community, which had existed between *Sylvain Peyroux* and the plaintiff's mother, could not be set aside, unless the parties interested were made parties to the proceedings.

The plaintiff, subsequently, instituted an action of nullity against *Sylvain Peyroux* and his minor children, and obtained a judgment annulling three decrees of the court of probates, to wit: 1st. The decree appointing *Sylvain Peyroux*, as tutor of the plaintiff. 2d. The decree ordering the sale of the community property. 3dly. The decree homologating the account filed by *Sylvain Peyroux*, as tutor of the plaintiff, on the 1st April, 1846. The same judgment adjudged the defendant, *Peyroux*, to pay the plaintiff \$24,539 04½, with legal interest and mortgage.

This judgment is not conclusive upon the defendant, who being a party in interest, had no notice of the proceedings, and no opportunity to defend his rights. The plaintiff, taking this view of the law, has supported his judgment of revocation, by introducing in this suit the evidence upon which it was obtained; and we concur with the district judge, that he has satisfactorily proved the reality and amount of his claim, and that the appointment of *Peyroux*, as his tutor, and *Castilloro*, as his under-tutor, and all the family meetings held for his benefit, were null and void; but it does not follow, that the probate sale is also null and void for the same reasons. The plaintiff shows, for the first time in this suit, that he has renounced the community; he can, therefore, exercise no right as joint owner of a portion of it; he bases his action, exclusively, upon the ground that he is a mortgage creditor, and the nullities alleged, are not such as can avail creditors. As we said in the former case, they can be taken advantage of by the heir alone, in his capacity of heir, and may be cured by his ratification, expressed or implied, after he becomes of age. We consider that the renunciation of the plaintiff to the community, after he became of age, rendered the judicial sale of the community property valid. The renunciation of a community by the heir of the wife, has, like that of a succession, a retrospective effect; the heir of the wife who renounces the community, is considered as never having had any interest in it, and his portion belongs to the surviving partner in community, by force of his original title, *jure non decrescendi*. Pothier, traité de la Communauté, No. 568, 572, 578. Delvancourt, Leo. 4, tit. 1. Des contrâts du mariage, sec. 5. Des suites de la dissolution du la communauté, p. 1. Note 2, page 28, (page 46, notes.)

The plaintiff never having had any right in the community, the surviving partner in his own right, and also as recipient of the share renounced, and as tutor of his minor children, had capacity to administer and sell the property of the community, so long as creditors did not object. See the case of *Bryan v. Atchison*, 2d Ann. 463.

This sale, however, has been annulled as fraudulent, contradictorily with *Sylvain Peyroux*; the judgment annulling it, has not been appealed from, and is conclusive against him, and all parties to the fraud it perpetrated. The participation of *McCarthy* and *Barrett*, and their combination with *Sylvain Peyroux*, to defraud

the plaintiff and *Peyroux's* own children, are clearly shown; but there is not in the record sufficient evidence to impeach the good faith of *Delery*, so far as the sale, in controversy, is concerned. It has been urged, in argument, that after the sale to him by *Barrett*, this slave, and all the other property conveyed, remained in the possession of *Peyroux*; that fact was susceptible of direct proof, and should not have been suffered to rest on remote inferences. The defendant, under his purchase from the bank, has required *Delery's* title, cannot be affected by the frauds of the purchasers at probate sale, and of the party to whom they sold. The only question, therefore, which the case presents, is, whether the legal mortgage existing in favor of the plaintiff on the community property, was entirely extinguished by the probate sale.

In the case of *Sarapure v. Debuys*, 6 N. S. 19, it was held, that a succession sale of the property of the husband, by virtue of an order of the court of probates, extinguishes all mortgages in favor of his heirs. But that a sale of the property of the surviving wife, made under the same order, does not produce that effect. In the case of *Goice v. Poydras*, 6 L. R. 283, it was decided that all mortgages created by the deceased, on his own property, were extinguished by a sale made under an order of the court of probates. We are not aware that the rule has ever been carried further, and, in a late case, we recognized the analogous principle, that where common property was sold to effect a partition, and purchased by a party having previously no interest in it, the legal mortgage existing upon it against one of the joint owners, continued in force.

The probate sale, in this case, was made in the succession of *Mrs. Peyroux*, and so far as the property sold was hers, there is no doubt that the mortgage existing in favor of the plaintiff was extinguished, but *Sylvain Peyroux* owned one-half of the property in his own right, and after the renunciation of the plaintiff to the community, he must be considered as the owner of one-sixth of the other half from the death of his wife. Those seven-twelfths formed no part of the succession, and if the plaintiff had a legal mortgage on the property of *Sylvain Peyroux*, under the authority of the case of *Sarapure v. Debuys*, the sale of *Peyroux's* share of the community, under the order of the court of probates, left it in full force.

Had the plaintiff a legal mortgage on the property of *Sylvain Peyroux*, and, if so, from what date?

It is true, that by marrying the plaintiff's mother, he became the co-tutor of the minor in 1828, but as the tutrix was authorized by the judge, on the advice of a family meeting, to retain the tutorship, no mortgage attached on his property; he became bound, *in solido* with his wife, for her faithful administration during the marriage, but the obligation was purely personal. 1 Delvan-court, notes to page 107.

In September, 1841, *Peyroux* caused himself to be appointed dative tutor of the plaintiff; on the 16th of that month, he took the oath and entered upon the discharge of the duties of tutor. It has been shown, that this appointment was illegal, and that he never gave bond; but this cannot prevent the legal mortgage in favor of the plaintiff from taking effect. Whether *Peyroux* was tutor, or acted as such without authority, the rule is the same. The mortgage took effect on the 16th of September, 1841, at latest, and is to continue to the settlement of the final account of the tutor. Civil Code, 3282, 3283. 2 Trop-  
long Hyp., No. 428.

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The entire amount claimed by the plaintiff, came to the possession of his mother after her second marriage. *Peyroux* was therefore bound, in *solido* with her, to account for it, being the debtor of the plaintiff at the time he commenced to act as his tutor; a legal mortgage attached to his property for the amount due.

It is urged, that the receipt of *Peyroux* to *Canterelle*, dated the 16th May, 1842, for \$20,000, inherited by the plaintiff from his grand-mother, should have been excluded, on the ground that it is *res inter alios acta*, and further, because it was executed after the judicial sale of the property, under which judicial sale, and by mesne conveyances, the defendant claims title.

The grand-mother of the plaintiff died in 1839; the account of the administration of her succession, fixing the share of the plaintiff at the sum of \$20,000, was homologated on the 11th of November of that year. This was during the lifetime of *Mrs. Peyroux*; the receipt given after her death by *Peyroux*, was admissible to prove, that the amount, shown by other evidence to be due to the plaintiff, had been received, and as the mortgage against *Peyroux* takes date from the time he commenced to act as tutor, if not from the day of his appointment, the date of the receipt is not material; the presumption is, that the money was received long before it was given.

It is urged, that *Peyroux*, acting as tutor, has released the mortgage given by *McCarthy*, the purchaser at probate sale, and that, as to third persons, the release is valid, though the money was not paid. *Kemp, tutrix, v. Rocolety et al.*, 2d Ann. 316.

Conceding that *Peyroux* might have raised that mortgage, so far as the succession of his wife was concerned, it is hardly necessary to say, that he could not then defeat a legal mortgage created, after the death of his wife, against himself individually, and that the plea that he has done so, is totally inadmissible as a defence. It is not shown, however, that he has attempted to raise that mortgage.

We are of opinion that the plaintiff has a mortgage on seven-twelfths of the property in controversy.

It is therefore ordered, that the judgment in this case be reversed. It is further ordered, that seven-twelfths of the slave *Crawford* be seized and sold under the plaintiff's mortgage, and that the proceeds of the sale, after deducting costs, be paid over to the plaintiff and credited on his judgment against *Sylvain Peyroux*. It is further ordered, that between the defendant and the warrantors, the case be remanded to await the sale of the slave under this decree, and then for further proceedings according to law; the costs of this portion of the appeal to be paid by the warrantors.

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#### SAME CASE—ON A RE-HEARING.

Where the surviving husband by a second marriage, under an order of court in pursuance of a family meeting, sells the community property, which, by subsequent conveyances, gets into the hands of an innocent purchaser, the property thus sold will be freed from the mortgage in favor of the minor by the first marriage of the deceased, of which the husband was co-tutor, although the order of sale was illegally granted, and was subsequently annulled at the suit of the minor; the cause of nullity being relative merely.

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THE judgment of the court was pronounced by SLIDELL, J. The question in this cause is, whether *Fabre* has a right of legal mortgage upon a slave owned and possessed by the defendant.

The facts material to this inquiry are the following: The plaintiff's mother married *Sylvain Peyroux*. This slave formed part of the community of acquets and gains which existed between *Peyroux* and his wife. She died, leaving children, issue of her marriage with *Peyroux*. He was confirmed by the Court of Probates of St. Bernard, the domicile of the plaintiff and of *Peyroux*, and the place where her succession was opened, as natural tutor of those children, and was also, upon the advice of a family meeting, appointed dative tutor of the plaintiff, who was then a minor, and continued to live in that parish until the year 1843, when he went to France. He became of age sometime in 1843 or 1844. An inventory of the community property of *Peyroux* and wife was made, and, in 1841, *Peyroux*, as tutor of his children, and dative tutor of *Fabre*, presented a petition to the court of probates of said parish of St. Bernard, praying an order for a family meeting to deliberate on the propriety of selling their interest in the community property. The family meeting declared that, in their opinions, a partition in kind could not be made without great injury to the minors, and that a partition, by sale at auction, would be advantageous to them, and they recommended that the share of the minors be sold on certain designated terms of credit. *Peyroux* then, in his capacity of tutor and dative tutor, presented the deliberations of the family meeting to the Court of Probates of St. Bernard, and represented in his petition, that it was for their interest that their property should be all sold, and he accordingly prayed for such order of sale as might be proper, in order that the sale might be effected according to the advice of the family meeting. Upon this petition the court made a decree, ordering, not that the mere interest of the minors be sold, but the entire property. The words of the decree are: Let the deliberations of the family meeting be approved and homologated, and let the property belonging to the community heretofore existing between the petitioner and *Rose Aglac Canterelle*, his diseased wife, be sold. In pursuance of this decree, the entire community property, and not the mere interest of the minors, was sold at public auction in 1841, by the same parish judge who made the decree, he acting in his capacity of auctioneer *ex officio*. The entire property of the slave in question was adjudicated, with other community property, to *McCarthy*. *McCarthy* afterwards sold the slave to *Barrett*; *Barrett* sold to *Delery*. The mortgage notes for the price given by *Delery* were discounted by the Bank of Louisiana. The bank subsequently caused the slave to be seized and sold under the mortgage, became itself the purchaser at sheriff's sale, and then sold to *Hepp*, the defendant. Whatever fraud and collusion may have existed between *Peyroux*, *Barrett*, or other antecedent parties, the good faith of the bank and of *Hepp* is unquestioned.

Thus, it appears, that the same judgment which authorized the sale of the interest of *Mrs. Peyroux's* succession in the community property, contemplated and authorized the simultaneous sale of *Peyroux's* interest. The whole was ordered to be sold, and was sold undivided. That decree was made by a court which had jurisdiction over the person and estate of the minor *Fabre*, at the instance of the dative tutor of the minor. It is manifestly inconsistent with that decree, that the minor's mortgage, supposing it had then attached on *Peyroux's* share, should continue after the sale on any portion of the community property. To permit it so to continue, would be to permit the decree of the court to be a snare to the public.

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Then the interest of *Peyroux*, as well as that of the succession of *Mrs. Peyroux*, having been sold in mass, in pursuance of a decree, which necessarily released the legal mortgage; and that decree having been rendered by a court clothed with jurisdiction over the person and rights of the minor, third persons holding in good faith, under that decree, are protected by it. Now the bank and the purchaser stand in that attitude; and even if the original purchaser, *McCarthy*, and some of the other parties to the intermediate conveyances were colluded with *Peyroux*, and would, therefore, have been subject to an equity in favor of the minor, yet that equity being secret, could not affect either the bank or the defendant, who holds under the bank.

So as to the objections to the appointment of *Peyroux*, as dative tutor of the minor, on the ground that the minor children of *Peyroux*, whom he represented as their natural tutor, and *Peyroux*, himself, as debtor of the petitioner, had interests adverse to the plaintiff; as these were, at most, relative nullities, and the appointment was not absolutely void, third persons are not thereby affected.

This case seems properly to come under the doctrines enunciated in *Lallanes' Heirs v. Moreau*, 13 L. R. 436. *Bach v. Abbott*, 6th Ann. 809. *Stockton v. Craddick*, 4th Ann. 282. *Pike v. Mongel*, 4th Ann. 227.

The above are the considerations which induced me to dissent from the opinion hitherto given by the majority of the court in this case.

I think the judgment of the district court should be affirmed.

It is therefore now decreed, that the judgment heretofore rendered in this cause by this court, on the 6th June, 1850, be set aside, and that the judgment of the district court be affirmed; the appellant to pay the costs of the appeal.

EUSTIS, C. J. and PRESTON, J., concurring.

ROST, J., dissenting. I adhere to the opinion first delivered in this case. I do not understand how the order of the judge to sell the interest of *Peyroux* in the slave, with that of his late wife, on his application as tutor, can bring his share under rules exclusively applicable to succession property; or how the decree and sale, under it, were inconsistent with the mortgage of the plaintiff, and necessarily raised it. If it did, then all decrees in actions of partition and sales under them, also necessarily raise the mortgages existing against any of the joint owners.

The fears entertained of the consequences which would flow from the enforcement of such a mortgage, are, in my opinion, imaginary. The question, under consideration, first came before the Supreme Court in 1827, in the case of *Sarapure v. Debuys*, 6 N. S. 19. It was then, for the first time, held, that a sale of property made by virtue of an order of the court of probates, extinguishes all mortgages in favor of the heirs of the deceased, whose property is thus sold; but that a sale, by virtue of such order, of the property of a person living, produces no such effect. A quarter of a century elapsed before this exception to the rule was again invoked, and there is no reason to believe that it will be so more frequently hereafter. The principle of the decision itself, did not receive, at the time, the assent of the bar, and has been acquiesced in, mainly on the ground of expediency. I am unwilling to overrule the exception in that case, and to extend the principle of the decision to the property of persons living at the time of the sale.



## THOMAS HASSAM v. ST. LOUIS PERPETUAL INSURANCE CO.

Where goods are sold by the captain, in order to obtain funds for repairing particular average losses, or for defraying the ordinary expenses of navigation, the loss arising from their sale must be made good by the ship-owner alone. Where, on the other hand, they are sold for the purpose of defraying expenses or repairing losses, which are themselves of the nature of general average, the loss arising from their sale, gives a claim to general average contribution.

**A**PPEAL from the Third District Court of New Orleans, *Kennedy, J. C. Roselius and John Claiborne*, for plaintiff. *Hunton and Bradford*, for defendants. The judgment of the court (*Preston, J.*, absent,) was pronounced by *SLIDELL, J.* This case was submitted in the court below, upon the following agreed statement of facts:

"The brig *Hardy* sailed from New Orleans on or about the 1st October, 1849, on a voyage to San Francisco; her cargo consisting principally of lumber and merchandise. Insurances on the freight and cargo of the vessel were effected in the various offices; that, with the defendants, being \$10,666 on freight, and \$5,000 on cargo, making a total on both risks of \$15,666. While prosecuting her voyage, and when about latitude 38° 42' south, and longitude 50° 17' west, the vessel encountered such tempestuous weather, and was thereby so disabled, that it was found necessary to bear away for the nearest accessible port for repairs. On the first day of February, 1850, the ship was accordingly put away for Montevideo, where she arrived on the 10th day of that month. Upon surveys and examinations, it was found that she was much strained in her seams, leaking badly, and her rudder post twisted, so as to render re-caulking necessary; and also, a new rudder, in order to make the vessel fit to proceed on her voyage. In order to pay for the repairs and necessary expenses of the ship during her stay at the port of distress, and after having unsuccessfully attempted to raise funds by draft upon bottomry bond upon the owners, the captain was forced to sell a portion of the cargo. The value of the cargo so sold, estimated at the San Francisco prices, was \$7,950; from which, deducting necessary and usual charges, there remained (Montevideo currency) \$6,342 84, the value at Montevideo.

"It is admitted, that the vessel could not have completed her voyage without the repairs; that the cargo would have been almost sacrificed by a sale at Montevideo; that no means of transhipping the cargo to its port of destination presented themselves, and that it was impossible for the master to raise the necessary amount for expenses and repairs, in any other manner than by the forced sale of a portion of the cargo.

"The vessel, freight and cargo were the property of *H. H. Raymond*, agent, 8-38; *Joseph Curtis*, agent, 8-38; *Thomas Hassam*, 6-38; *Wm. H. Simmons*, 4-38; *John Meggett*, 4-38; *Thomas M. Meggett*, 4-38; *W. C. Auld*, 2-38; *J. Guard*, 2-38.

"The premium note for \$647 59, is admitted to be yet due defendants on account of the policy, with the interest thereon.

"Two adjustments of average have been made by adjusters, at the request of the parties; that marked 'A,' made by *R. Brennan*, representing the views of the

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plaintiffs, and that marked 'B,' made by *A. Brother*, those of the defendants. Both are submitted herewith to the court.

"It is well understood that the real plaintiffs in this suit, and for whose use it is prosecuted, were the owners not only of the ship, but the cargo and freight."

By reference to the adjustments above referred to, it further appears that the money produced by the sale of the goods at Montevideo, was \$1607 16 cents, exhibiting a loss on the goods by the forced sale of upwards of \$6,000; that this money was disbursed, partly for purposes, which the defendants admit come under general average, to wit, port charges, pilotage, discharging cargo, provisions and wages of crew during deviation, re-loading, surveys, protests, &c.; and partly in paying the bills for repairs of the vessel, and partly for purposes of the owners of the vessel. The vessel was uninsured.

It is contended by the plaintiffs, that the whole amount of the loss sustained by the sale of the goods, should be brought into general average; while the defendants say that the measure of liability, by way of general average, is such proportion of that loss as the general average charges bear to the whole amount disbursed. The latter theory prevailed in the court below.

We have looked with some care into the decided cases and the treatises on the subject of general average, a branch of the commercial law, which is unhappily perplexed by discordant rules and subtle distinctions. The result of our examination is, that the rule of apportionment claimed by the defendants is the correct one.

It would seem, according to Emerigon, that under the Roman law, from which the modern doctrine of general average is derived, if a ship found herself incapacitated, by *vis major*, to continue her navigation, and put into a port in order to effect repairs, neither the expenses of the repairs nor of the stay entered into general average. It may be questioned whether the case, cited in the Digest, sustains his assertion, as to the expenses of the stay; but it is clear to the point, that the cost of the repairs was not so chargeable. See Meredith's Emerigon, 4, 81.

But even if the ancient doctrine was, as stated by Emerigon, it has been in modern times enlarged; and, although there is much variance in the custom of commercial nations and the views of legislators and jurists, yet most of them harmonize to this extent, that they allow some portion of the expenses thus incurred, upon the ground that putting into port, in order to repair, is a measure voluntarily taken for the general preservation.

In England and the United States, it is fully settled, by numerous decisions, that where it becomes necessary to enter an intermediate port, because the vessel, in consequence of a particular damage sustained, is unfit to prosecute her voyage; as when masts, sails, or other requisite apparel are lost in a storm, or the vessel has sprung a dangerous leak, the expenses of entering the port are a subject of general average, being considered as the consequence of a measure voluntarily taken for the preservation of the whole. In carrying out this doctrine, however, into practical details, the American and English decisions are in some respects conflicting, as in the case of wages and provisions of the crew during the delay for the purpose of repairs, which, in England, follow the expenses of the repairs themselves, while in the principal commercial States of this Union, they are allowed as general average.

But with regard to the expenses of the repairs themselves, the case is different. These are not, like the expenses of putting into the port of distress, the

consequences of an extraordinary step taken for the general benefit. They are the consequences, not of the putting in to refit, but of the injury which the ship has sustained by the violence of the winds and waves, which loss her owners are themselves to bear, and not the owners of the cargo. The cost of such repairs is a charge imposed upon the ship by the contract of affreightment, whereby the captain and owners are bound to maintain her in a fit state for transporting the cargo to its place of destination. Of this duty the shipper has a right to demand the fulfillment, without contributing to the expense. Nor is it any answer to say that the repair of the ship is for the advantage of the shipper, because it tends to forward the voyage. It must also be remembered, that while the duty of repairing is incumbent upon the ship-owner, by virtue of the contract of affreightment, he has, on the other hand, the benefit of the merchant's obligation to wait a reasonable time for the repairs at the intermediate port, or pay full freight. It is not, therefore, without reason that Mr. Stevens, in treating of the repairs done to a ship in a foreign port where she puts in in distress, in order to enable her to complete her voyage, expresses his surprise that any discussion should have taken place on the subject of their exclusion from general average, or that their could ever have been any doubt that the owner of the ship was bound to keep his ship in repair. The idea, he observes, could only have originated in the supposition that what was eventually for the general good; that is, in this case, the arrival of the ship with her cargo, should be borne by a general contribution. See Stevens on Average, p. 42; Benecke on Indemnity, p. 193; Arnould, vol. 2, p. 906, 907; *Padelford v. Boardman*, 4 Mass. 551.

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Of course, in these remarks, we are limiting ourselves to the case where the damage to the ship was incurred by the violence of the winds and waves; for it seems to be generally recognized, and to be consistent with reason and principle, that if a vessel necessarily goes into an intermediate port, in consequence of an injury, which is itself the subject of general average, as, for example, masts cut away; such repairs, as are necessary to repair that injury, are to be considered as general average.

Having thus considered the general doctrine, touching the expenses of going into port of distress and the expenses of the repairs, it is necessary now to consider the consequences of a sale of goods effected at the port of distress, in order to defray such expenses.

It is an indisputable doctrine in commercial law, that in cases of absolute necessity, when the master, being in a foreign port, has no other means whatsoever of raising money to defray indispensable expenses incurred for the necessities of the ship, he may sell part of the cargo for the purpose of procuring funds. The right has been correctly said to be sanctioned by the earliest and most recent codes of maritime law, and by the jurisprudence of our own country.

When a loss is incurred by a sale thus made, that is to say, when the goods have been sold below the rate which, making the usual allowances, they would have produced at the port of destination, on whom is this loss to fall?

In order that this question may be answered consistently with the principles already stated, it seems to us indispensable to consider the respective purposes for which the funds thus raised were necessary. And when that is ascertained, the equitable and true rule seems to us to be, that so much of the expense of raising the funds, namely, in this case the loss upon the goods sold, as is proportionate to the sum actually necessary for those purposes which were proper subjects of general average, should be admitted in the account of general average; and

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that, on the other hand, so much of that expense, or loss, as is proportionate to the sums necessary for purposes of particular average, should be borne by the particular interest. 'It is a gross abuse,' says Mr. Benecke, 'when, as is sometimes done, the whole charges for obtaining funds, such as marine interest, &c., are passed to the general average account, although a part of those funds have been employed for a particular average on the vessel, or for the restitution of other partial damages. This also applies to commissions of agents and attorneys, surveyor's fees, brokerage, postage and other similar charges. So much,' he observes, 'of the charge of procuring funds, as corresponds with the sum actually employed for the purposes of general average, and no more can be admitted.' Benecke on the Principles of Indemnity, p. 244, London edit. of 1824.

In a subsequent chapter of the same work, wherein he treats particularly of money raised abroad for the purposes of the voyage, and its relation to average, he remarks: 'If the sale of goods be effected for reasons which constitute a general average, it cannot be doubted that a general contribution must take place, whether the ship and cargo reach their destination or be lost. If the cause of sale be a mixed one, that part will be made good by general average contribution, which was applied to disbursements of that kind, and the owners will be personally liable for the remainder.' Ibid. p. 273.

Mr. Arnould, in his admirable Treatise on the Law of Marine Insurance, adopting the views of Mr. Benecke, states, that in his opinion, the law of England on this subject is, that where goods are sold by the captain, in order to obtain funds for repairing particular average losses, or for defraying the ordinary expenses of the navigation, the loss arising from their sale must be made good by the ship-owner alone, who must, in such case, pay the merchant the price which the goods would have fetched at their place of destination, deducting therefrom the freight which would have been due for their conveyance. Where, on the other hand, they are sold for the purpose of defraying expenses or repairing losses, which are themselves of the nature of general average, the loss arising from their sale gives a claim to general average contribution.' Arnould, 2, p. 893.

It is true, Mr. Kent, in treating of the subject of general average, remarks: 'If part of the cargo be sold for the necessities of the ship, it is in the nature of a compulsive loan for the benefit of all concerned, and bears a resemblance to the case of *Jettison*; and if the ship be afterwards lost, the goods saved must contribute towards the loss of the goods sold, equally as if they had been thrown overboard to lighten the vessel. In such a case, a portion of the cargo, according to Lord Stowell, is abraded for the general benefit.' Kent. vol. 3, p. 241.

In this general enunciation, that eminent author does not designate the nature of the necessities, to meet which, the sale effected will draw with it as a consequence the right of a contribution from goods saved; and, moreover, he supposes the subsequent loss of the vessel.

In view of the qualified terms, in which Mr. Kent speaks of the right of contribution in the case of goods sold, it would be dangerous to carry the doctrine thus enunciated beyond the case put by that author; and this restricted interpretation of it seems the more proper, when we recur to the authorities which he cites in support of his opinion, and upon which, we may reasonably infer, it was based. These authorities, as will be seen by the note to the passage in question, are, Hall's *Emerigon on Maritime Loans*, p. 94; and the case of the *Grati-tudine*, 3 R. R. 364, upon which celebrated case, great stress was laid by the plaintiff's counsel.

In Emerigon's work, *loco citato*, it is said: "It is a question whether the goods saved ought to contribute to the payment of those which have been previously sold. I believe that they must; and I derive my opinion from the rule which is established respecting goods thrown overboard to lighten the vessel, of which I have spoken in my Treatise on Assurance. For it is immaterial whether the goods be cast away or sold for the common benefit. I admit, that if the ship arrives in port, the owners are obliged to pay the value of the goods sold in the course of the voyage for the necessities of the ship, without power, excepting the case of right to institute the action of gross average. But if the vessel be lost, and part of the cargo be saved, the action of gross average is the only means of establishing an equality among the freighters, and regulating the contributions of the parties respectively."

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In the case of the *Gratitudine*, the counsel for the petitioners, the lenders on bottomry and hypothecation of ship, freight and cargo, admitted in argument, that the cargo could not be called upon to pay what was expended in repairs of the vessel, until the proceeds of ship and freight were exhausted, and they quote the opinion of Emerigon: "Si au lieu de prendre des derniers à la grosse, le capitaine avait vendu pour cause legitime, une partie des marchandises du bord, et que au retour du voyage le navire et le fret (aggravés par des engagements posterieurs et par les salaires de l'équipage) fussent insuffisants pour rembourser le prix des dites marchandises, cette partie devrait être supportée au sol la livre par les autres marchandises." And again: "Celui dont les effets sont vendus, pendant le voyage, pour les nécessités de la navigation, n'a pu ni s'y opposer ni se procurer aucune ressource particulière contre la personne du capitaine. Il es donc juste qu'en cas d'insuffisance du navire et du fret abandonnés par les propriétaires, la perte soit réglée sur l'universalité des chargeurs dont la condition doit être égale."

In his celebrated opinion in that case, Sir William Scott clearly intimates a recognition of that doctrine, for he lays stress on the fact, that the master had, at the time of hypothecation, when he compulsorily assented to the exaction of the security of the ship, freight and cargo, by the lender, reasonable ground to hope that the ship and freight, and average expenses falling particularly on the lading, would have been sufficient to discharge the bond, without calling on the cargo; and he also lays stress on the fact, that the bond having been put in suit, and the ship sold, her proceeds were insufficient to discharge the bond. The prayer of the petitioners was for a monition against the bail given to answer the action in respect to the cargo and freight, for payment of the balance due, after payment of the proceeds of the sale of the ship.

Thus it appears, at most, from these authorities, that the primary obligation to meet the loss of goods necessarily sold for the purpose of paying for repairs, rests upon the ship, and resort, by contribution, is not to be had to the owners of cargo saved, unless the ship be lost, or the proceeds of the sale be first exhausted, so that such relief is indispensable to put the owner of the goods sold on an equal footing with the other shippers. See, also, *Pope v. Nickerson*, 3 Story's Rep. p. 500.\*

\* In *Pope v. Nickerson*, Mr. Justice Story says: "That where goods are sold in a port of distress to pay for repairs, it is a loan which the maritime law allows the master to make on account of the owners, as resulting from their implied authority, and with their consent." So it was treated in the case of the *Gratitudine*, 3 R. R. 240; and in the case of the *Packet*, 3 Mason, 255. Then, it being a careful application of the funds of the shipper, without his

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It is obvious, that the present case does not fall within the doctrine enunciated by Mr. Kent. For here the vessel arrived at her port of destination safe, and unincumbered by subsequent engagements.

It was argued on the part of the plaintiffs, that although the general rule is, that the owner must keep the vessel in a seaworthy condition at his own charge, the present case should be considered an exception, because the repairs, which ought, say they, to be considered as only benefiting the ship to the amount of the sum paid for them at Montevideo, really cost three or four times that amount, by reason of the loss incurred in the sale of the goods to raise the money. The whole loss on the goods, they contend, should be considered as incurred for the benefit of all the interests, according to the doctrine announced by Lord Ellenborough, in *Plummer v. Wildman*, in which case he said: "If the return to the port was necessary to the general safety of the whole concern, it seems that the expenses unavoidably incurred by such necessity, may be considered as the subject of general average. It is not so much a question whether the first cause of the damage was owing to this or to that accident, to the violence of the elements, or the collision of another ship, as whether the effect produced was such as to incapacitate the ship, without endangering the whole concern, from further prosecuting the voyage, unless she returned to port and removed the impediment. As far as removing the incapacity is concerned, all are equally benefited by it, and, therefore, it seems reasonable, that all should contribute towards the expenses of it; but if any benefit, ultra the mere removal of this incapacity, should have accrued to the ship by the repairs done, inasmuch as that will redound to the particular benefit of the ship-owner only, it will not come under the head of general average; but that will be a matter of calculation upon the adjustment. The amount of the expenses of repairing to be placed to the account of general contribution, must be strictly confined to the necessity of the case, and the arbitrator will have to determine how much was expended upon such repairs as were absolutely necessary to the enabling the ship, with her cargo, to prosecute the voyage, and for so much, and no more, the defendant will be liable to contribute. As for the charge for the captain's expenses during the unloading, repairing and re-loading, the ship-owner must bear the captain's expenses in port, and primage must be disallowed; it does not come under general average." 3 Maule & Selwyn, 487.

The plaintiff's counsel also refer to what is said by Mr. Kent, in his chapter on general average: "If the expense of the repairs would not have been incurred but for the benefit of the cargo, and might have been deferred with safety to the ship to a less costly port, such extra expense is general average."

It may well be questioned whether the expensiveness of the repairs has any control over the question of general average. Mr. Benecke, to whom Mr. Kent himself refers for a more minute detail of the principles applicable to general average (3 Kent, 242), and whose treatise he commends for its great research, clear analysis and accurate application of principles, declares expressly that the expenses of repairing damage accidentally sustained by the vessel, must fall upon the owners, however they may exceed what the same repairs might have

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consent, for the use and benefit of the owners of the ship, and by their authority and consent, it seems to me that the case is governed by exactly the same principles as if the money had been borrowed of a third person, and applied to the same purposes, that is, it would have bound the master personally, and the owners personally, and have also created a lien on the ship *in rem*.

cost in another port (p. 194). Moreover, although the repairs in the present case were quite expensive, by reason of the loss incurred in raising money to pay for them, it is clear they could not have been deferred, with safety to the ship, to another port. The vessel could not have completed her voyage without the repairs; nor can we say that the expense of the repairs would not have been incurred, but for the benefit of the cargo. Without the repairs, the ship was unnavigable; but in her sound condition, after repairs, her value was \$7,000, which is much more than their cost. So that, in point of fact, as we infer from the evidence, it was the interest of the owners to spend what was virtually spent in repairing her, with reference merely to the ship herself.

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As to the case of *Plummer v. Wildman*, we are unable to assent to the doctrine of Lord Ellenborough, touching the expense of repairs. It is very difficult to reconcile his remarks in that case, with what he said in the subsequent case of *Power v. Whitmore*, 4 Maule & Selwyn, 144. Mr. Arnould and Mr. Benecke, both disapprove the doctrine announced in the former case, and consider it as overruled by *Power v. Whitmore*. Benecke, 197. 2 Arnould, 908.

It was expressly adjudged in *Power v. Whitmore*, that the repairs of the ship, which had been compelled, for the safety of the ship and cargo, to put into a port in order to repair a damage occasioned by a tempest, were not a subject of general average.

Mr. Phillips also very distinctly intimates his dissatisfaction with the doctrine in *Plummer v. Wildman*, and with a case in Massachusetts (7 Pickering, 268), which was decided according to what was considered to be the ruling in that case.

After the fullest consideration which we have been able to give to this cause, and to the very interesting and important branch of commercial law which it involves, we are unable to see how, consistently with those general principles which regulate the contract of affreightment and the subject of general average, the expense of these repairs, which were rendered necessary by particular average loss, and which were indispensable for the ship's own safety, and to render her seaworthy in the further prosecution of the voyage which she had undertaken to perform, can give a claim to general average.

It appears to us, that the reasons stated by one of the adjusters, are not sufficient to exclude entirely any charge for commission for collecting and settling the general charges. It would seem reasonable, however, that they should not be as high as in ordinary cases, where the owners of ship and cargo are different, for the amount of trouble incurred is not the same. There is no evidence of the usage on the subject in a case like the present; the amount involved is small, and as the parties have not furnished the necessary evidence to enable us to close the matter, we do not think the judgment should be opened on that account, which would throw the costs on the appellees, and also involve the expense of a new trial.

It is therefore ordered, adjudged and decreed, that the judgment of the court below be affirmed; the cost of the appeal to be paid by the appellants.

## JOHN HOHL v. J. F. MEYER.

Where the appellant abandons his appeal, the appellee may bring up the record and have the judgment affirmed, with damages.

APPEAL from the First District Court of New Orleans, *Larue, J. B. Beauregard* and *J. A. Nautré*, for appellant. *D. C. Labatt*, for appellee. The judgment of the court (*Eustis, C. J.*, absent,) was pronounced by

Rost, J. Judgment having been rendered against the defendant in this case, for a sum of money, he took a suspensive appeal, which he failed to prosecute. The appellee has brought up the record, for the purpose of claiming damages as for a frivolous appeal.

Had the appellant prosecuted his appeal, the evidence of his indebtedness is not of such a character as would have authorized the allowance of damages. But as he has abandoned it, and thereby admitted the correctness of the judgment; the prayer of the appellee must be granted.

It is therefore ordered, that the judgment in this case be affirmed, with costs, and ten dollars damages.

## JOHN GAUCHE v. MR. and MRS. TRAUTMAN.

Where in the distribution of a fund in the sheriff's hands, to which various persons set up claims, one of the creditors, for a sum over three hundred dollars, appeals solely from a judgment allowing another creditor two hundred and eighty-six dollars, the appeal will be dismissed, upon the ground that the appeal is for a sum below the jurisdiction of the Supreme Court. No one but the appellee can join in the appeal.

APPEAL from the First District Court of New Orleans, *Larue, J. C. Dufour*, for appellant. *M. M. Cohen*, for appellee. The judgment of the court (*Eustis, C. J.*, absent,) was pronounced by

Preston, J. *John Gauche* sued the defendants for rent, and caused the effects in their store, and a lease made to them, to be sold, which produced, in the aggregate, \$670 72. The court, on a rule to distribute the proceeds of the sale among several claimants, allowed the plaintiff and landlord \$355, leaving for further distribution \$315 72.

*P. and E. Reilly*, judgment creditors of the defendants, claimed and were allowed, as a privilege, by virtue of an attachment of that sum, \$286 42. This leaves less than that what was necessary to pay the costs, \$29 28.

*Bauvelet*, a judgment creditor for \$559, claiming the funds in the hands of the sheriff, appealed from the judgment in favor of the *Reilleys*, and cited them alone. They move to dismiss the appeal, on the ground that the amount, in controversy, \$286 42, does not give this court jurisdiction. The motion to dismiss, must prevail. It is true, that they claimed the whole amount of their judgment, out of the fund in the sheriff's hands; but they did not appeal from



the judgment in favor of *Gauche*, which being satisfied, leaves but the sum of \$286 42 in the sheriff's hands, as the subject matter of controversy between the appellant and appellee. It is clear, we have no jurisdiction of the controversy. Neither party having appealed, as to the judgment in favor of *Gauche*, nor he against them.

*Gauche* has attempted, in this court, to join in the appeal, and claims a reversal of the judgment. It is reserved to appellees alone, to join in the appeal taken against them. We are unable, therefore, to consider *Gauche* a party to the appeal, or to afford him the relief he claims.

Had *Gauche* appealed, or had either party appealed, as to him the case would have been similar to that of *Colt v. O'Callaghan*, 2d Ann. 189. But, as the case is before us, it falls within the decision in the case of *The Second Municipality v. Corning & Co.*, 4th Ann. 407. The amount in the sheriff's hands, about which the parties in this court contend, is less than three hundred dollars.

The appeal is dismissed, at the costs of the appellant.

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### THE MILNE ASYLUM v. THE FEMALE ORPHAN SOCIETY et al.

The testator had willed his property to two existing benevolent societies, and to found two others, one-fourth to each. Thirty thousand dollars had been set apart by the court of probates, to erect buildings, &c., for the two contemplated institutions. *Held*: That this amount should be deducted from the share of the said two institutions, as universal legatees, and that they were not entitled to that sum, over and above their shares, as universal legatees.

An account of executors, duly homologated, is *res judicata* between the executors and legatees, but is not so as to the legatees *inter se*.

**A**PPEAL from the Second District Court of New Orleans, *Lea, J.* *F. Buisson*, for plaintiff. *Elmore and King*, and *G. B. Duncan*, for defendants. The judgment of the court (*Eustis, C. J.*, absent,) was pronounced by

*Rost, J.* The will of the late *Alexander Milne*, contains the following dispositions: "It is my positive will and intention, that an asylum for destitute orphan boys, and another asylum for the relief of destitute orphan girls, shall be established at Milneburg, in this parish, and that my executors shall cause the same to be duly incorporated; and to the said two contemplated institutions, and to the present institution of the society for the relief of destitute orphan boys, and to the Poydras female asylum, I give and bequeath, in equal shares or interest of one-fourth each, all my lands on the Bayou St. John, and on the Lake Pontchartrain, including the unsold lands of Milneburg. I institute for my universal heirs and legatees, in equal shares or portions, the said four institutions, to whom I give and bequeath the residue of all the property and estate, movable and immovable, I may possess at the time of my decease, to be equally divided and apportioned among them."

The two asylums ordered to be established by the will, were incorporated by the Legislature, after the death of the testator; and the two others, named in this disposition, entered into a notarial agreement with them, by which they renounced the right which they had, to contest their capacity to take under the will, on the ground that they were not in existence at the date of the will, or the death

**MILNE ASYLUM** of the testator, and admitted them as joint universal legatees, in equal shares  
**v.** with themselves. The succession has since been administered, and in the divi-  
**FEMALE OR-** sion of the assets, the Milne Asylums have each received the sum of \$1,115 26,  
**PHAN SOCIETY.** more than their co-legatees.

The Milne Asylum for destitute orphan boys, now sues the Society for the relief of destitute orphan boys and the Poydras Asylum, alleging its right to receive from the succession of *Milne*, \$15,000 over and above its share, as universal legatee, and claims from them, jointly, the difference between that sum and \$1,115 26, already received on account.

The defendants deny the plaintiff's demand, and claim, in reconvention, \$1,115 26. The district judge rejected it, and allowed the claim in reconvention. The Milne Asylum has appealed.

The appellant basis its right to recover, on a judgment rendered in 1840, on a rule taken by the executors upon the four universal legatees and the attorney of absent heirs, to show cause why \$100,000 of the funds of the succession should not be appropriated for building, establishing and furnishing the two Milne Asylums, then lately incorporated by the Legislature. This decree is as follows :

"The court being of opinion, that it was the intention of the testator, that the Milne Asylums should be established out of the funds of the estate ; and considering, by the agreement entered into by the parties, that the sum of \$30,000 would be but a reasonable sum to be appropriated for the building, establishing and furnishing the Milne Asylums, for the relief of destitute orphan boys and orphan girls, do now order, adjudge and decree, that the dative executor of the estate do appropriate and set apart for the above purposes, the said sum of \$30,000, to be distributed in the manner which the said asylums may deem fit."

The agreement referred to in this decree, was, that the executor might set apart two sums of \$15,000 each, for the purpose of establishing the two Milne Asylums ; the representatives of these asylums stating, in the agreement, that they claimed these sums, independently of their right, as universal legatees, on a supposed intention of the testator to that effect ; the defendants, on the contrary, resisting any interpretation of the will, under which they would receive less than one-fourth of the estate, and reserving to themselves the right to appeal from the judgment about to be rendered on the agreement. They did not appeal, and the plaintiff's counsel contends that the judgment is now final, and that it is conclusive as to the right of the Milne Asylums, to receive over and above their share, the sum acknowledged by the defendants to be reasonable to defray the expenses of the establishments, which, in the opinion of the district judge, the testator intended they should have.

We do not so understand the decree. The judge does not expressly say, that the \$30,000 set apart by him, are to be paid over to the Milne Asylums, beyond their shares as universal legatees. We think, with him, that as the testator asked nothing for those asylums from the Legislature, except the acts of incorporation, he must have intended, that when incorporated, they should be established out of the estate, and that a sum of money sufficient for that purpose, should at once be appropriated to it, without waiting for the final settlement of the succession. But we are equally well satisfied, that the will is susceptible of but one interpretation, and that the cost of establishing them, must be imputed to their share as universal legatees. The judgment will bear that construction fully as well as the other, and as it best accords with the facts and the law, as well as the equity of the case, we feel bound to adopt it.

It is next urged, that the executor, in the rendition of his final accounts, MILNE ASYLUM expressly stated the right of the plaintiffs to an extra part of \$15,000, and proposed to distribute some assets remaining in his hands, in conformity thereto; v. FEMALE OR- that the defendants assented to the distribution, and made it binding upon themselves, by approving the account and discharging the executor. PHAN SOCIETY.

It is true, that *Mrs. Elizabeth Clement* and *Mr. Beverly Chew*, each representing one of the defendants, went before a notary, and took upon themselves to declare, that the principles according to which the tableau of the executor had been made out, (having reference to the judgment rendered in 1840,) were *res judicata* between the parties, and entitled the Milne Asylums to receive \$30,000 beyond their share, as universal legatees. But the legal opinions of old ladies, are not yet held to be precedents in courts of justice; and as the declaration was made in error, it ought not to prejudice the rights of the defendants.

The object of the executor, in filing his account, was to obtain his discharge, not to settle the accounts of the legatees *inter se*. The consent of the latter, that the account should be homologated, as presented, is binding between them and the executor; but it is not easily perceived, how it could be *res judicata* between the legatees. It is, however, unnecessary to decide that question, because the plaintiff's action involves a renunciation of that plea. If the judgment of homologation was conclusive as to all matters in the account, the payments mentioned therein, as having been made by the executor to the defendants, could not be recalled; and as the plaintiff has expressly agreed to warrant to them their allotted shares of the real estate, its action must necessarily fail.

Considering, that under that state of facts, the plaintiff could not avail itself of the plea of *res judicata*, if that plea was otherwise well founded, and that the questions at issue were open for adjudication in the district court, we are of opinion that justice has been done between the parties, and that the judgment should be affirmed.

The judgment is therefore affirmed, with costs.

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### MICHAEL MOORE v. F. H. KNAPP.

The judgment homologating a sale under a monition, may be appealed from, even where the appellant did not appear or show cause in answer to the monition.

The 6th section of the act of 10th March, 1834, prescribing the effect of a judgment on a monition, contemplates a judgment which has not been appealed from, and has thus become irrevocable.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Durant* and *Hornor*, for appellee. *John Finney* and *C. Roselius*, for defendant. The judgment of the court (*Eustis, C. J.*, absent.) was pronounced by

*SLIDELL, J.* This is an appeal taken by the defendant, from a judgment confirming a judicial sale, in a proceeding by monition under the act of 10th of March, 1834, p. 125.

The defendant did not appear and show cause in the court below, against the prayer of the monition. It is said by the appellee that, in such a case, the judgment of the district court is final and conclusive, and cannot be made the subject of an appeal. Before expressing our opinion upon this point, it is proper to recur to the language of the statute.

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The statute, as its title imports, was framed with a view to "the further assurance of titles to purchasers at judicial sales." By its second section, it authorizes the purchaser to publish, by newspaper, a monition, calling on all persons who can set up any right to the property, in consequence of informality, &c., &c., to show cause, within thirty days, &c., why the sale should not be confirmed. By section third, it is enacted, that the monition shall state the judicial authority under which the sale took place, and shall also contain the same description of the property purchased, as that given in the judicial conveyance to the buyer; and shall further declare, the price at which the object was bought. By the fifth section, it is enacted, that on the expiration of the thirty days, the party obtaining the monition may apply to the judge of the court, out of which the monition issued, to confirm and homologate the sale. And it shall be the duty of the judge, in case no cause is shown against the prayer of the monition, to homologate and confirm the judicial sale in question: provided, always, that before he does so confirm it, he shall be fully satisfied that the advertisements have been inserted in the newspapers as already directed, and that the property has been correctly described, and the price at which it was purchased, truly stated; but in case opposition be made to the homologation, and it should appear that the sale was made contrary to law, it shall then be the duty of the judge to annul it; otherwise to confirm, as in case no opposition was made. In the sixth section, it is enacted, that the judgment of the court on the monition aforesaid, shall be, in itself, conclusive evidence that the monition has been regularly made and duly advertised, nor shall any evidence be received to contradict the same, or to prove any irregularity in the procedure. By the seventh section, the judgment of confirmation shall bar minors, absentees, &c.

It will be observed, that in cases where no one shows cause against the prayer of the monition, the judge is commanded, by the statute, to direct his attention to three inquiries: Have the advertisements been inserted in the newspapers? Has the property been correctly described? Has the price at which it was purchased, been truly stated? Before he can lawfully decree the confirmation of the sale, he must be fully satisfied that those things have been done; and how is he to be satisfied of those facts? Certainly, as in other cases, by evidence—*il sara prouvé a sa satisfaction*, says the French text. The judge is, therefore, placed in the same position as in any other matter of judicial action. He is to receive evidence, consider its sufficiency and effect, and having applied his judicial reason to the subject matter, decide the case presented. In the performance of this judicial duty, the judge may err; and when it is considered that the decree is not interlocutory, but final, and that it acts definitively upon rights of property, it would be a strange anomaly if such a decree should be taken out of the ordinary category, and, unlike other final judgments, be irremediable by appeal. Such a construction of the statute, would involve a violation of the former Constitution, which gave the right of appeal in terms substantially the same, so far as the present question is involved, as are found in the existing Constitution.

In construing, therefore, the sixth section of the statute upon which alone the appellee rests his motion to dismiss the appeal, we must so interpret it, if possible, as not to bring the lawgiver into conflict with the Constitution; and there is no difficulty in doing this. The reason of the provision found in that section, was probably this: The proceeding, under the statute, was by monition;

the constructive notice, by newspaper publication, was substituted for the ordinary remedy of personal notice by citation. In the latter case, the evidence of service, whereby the court has acquired its jurisdiction over the person of the defendant, is a matter of judicial record, the sheriff's return. But the newspaper, which is the vehicle of constructive notice in monition cases, is a transient and unsafe memorial; and as no judgment is valid without notice, actual or constructive, to the party affected by it, the Legislature thought fit to cut off the future discussion which might arise as to the fact of publication, when the means of proving it might have disappeared. The judgment, therefore, says the statute, shall be, in itself, conclusive evidence that the monition has been regularly made and duly advertised. No one shall afterwards be permitted to attack the judgment as a nullity on the ground, that the indispensable basis of jurisdiction, notice actual or constructive, did not exist. But when is the judgment really a conclusive judgment in legal contemplation? Only when it has become irrevocably final. So long as it is open to appeal, its conclusiveness upon the right of parties is *inchoate* only.

Being therefore of opinion, that the sufficiency of the evidence upon which the judgment was rendered, may be considered by this court, we have to inquire whether the proof adduced before the district judge, conformed to the requisitions of the proviso contained in the fifth section. It should appear, from this evidence, that the advertisements have been inserted in the newspapers as in the statute directed; that the property has been correctly described, and the price at which it was purchased, truly stated.

Now, it appears from the statement of facts, that the evidence submitted to the district judge, consisted of: 1st, the affidavit of *J. S. Baron*, concerning the publication of the monition; 2d, the record of the suit of *Moore v. Knapp*, No. 4359 of the docket of the district court.

*Baron's* deposition does not show whether the description of the property, contained in the monition, corresponded with the description in the sheriff's sale. Nor did the record of the suit of *Moore v. Knapp*, as it existed at the time of the trial, show that fact.

The sheriff's return of the writ of *feri facias*, was not then part of the record. It was not made until some months afterwards. It bears date four months after the signing of the judgment of confirmation.

The sheriff's deed was, at the time, copied in the deed book, kept in the clerk's office, pursuant to the 697th and following articles of the Code of Practice. But we do not consider that enrollment, as forming part of the record of *Moore v. Knapp*. The evidence, therefore, presented to the district judge was insufficient.

In what we have hitherto said, we have assumed that the clause of the fifth section, which requires that the judge shall be fully satisfied that the property *has been* correctly described, means that he shall be fully satisfied that the monition described the property as it was described in the sheriff's sale. This is claimed, as the true construction, by the counsel for the plaintiff, and by one of the counsel for the defendant. But if we adopt the only other construction, of which the clause is susceptible, to wit, that the judge must be satisfied that the property was correctly described in the sheriff's proceedings, the advertisement, adjudication, &c., the result is equally fatal to the appellee. The sheriff's advertisement and the adjudication were defective in this; they described the property sold, as the interest of *Knapp*, in three judgments obtained in the name of

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*Paradise, Lawrason & Co.* against certain defendants, without stating, in any degree, the nature, extent, or proportions of *Knapp's* interest. This omission was calculated to cause a sacrifice of the defendant's property, by leaving bidders in uncertainty as to the nature and value of that which was sold, and was the less excusable, on the part of the plaintiff in execution, because, by the answers of persons whom he had garnisheed, he had been informed by the relations existing between *Knapp* and *Paradise, Lawrason & Co.*, in whose name the judgments were recovered.

Our views on the subject of advertisements in judicial sales, have been given on several occasions, and need not be reiterated here. See *McGary v. Dunn*, 1st Ann. 338. *Benile v. Maurain*, 5th Ann. 133. *Gales v. Christy*, 4th Ann. 293.

It is therefore decreed, that the judgment of the district court be reversed, and that the matter of monition be remanded; the costs of the appeal to be paid by the appellee.

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W. N. BATSON v. J. C. RICKS and J. L. LEWIS, Sheriff.

The plaintiff had sold to *Fields*, a quantity of coal, which was to be paid for on delivery. *Fields* failed to comply with his bargain, as to the payment. The defendant being a judgment creditor of his, caused the coal to be seized by the sheriff. The plaintiff demanded the rescision of the sale to *Fields*, upon the ground of the non-payment of the price, which was assented to by all parties, and the coal restored to him. He then brought suit for the damages caused by the seizure. Held: That under the circumstances, he was not entitled to damages, more especially as he had suffered *Fields* to retail some of the coal, which may have misled the defendant.

APPEAL from the Second District Court of New Orleans, *Lea, J. M. M. Cohen*, for plaintiff. *Hart and Reese*, for defendant. The judgment of the court (*Eustis, C. J.*, absent.) was pronounced by

PRESTON, J. The plaintiff sues the defendants for a quantity of coal and damages. He alleges that the coal belonged to him, and was seized as the property of one *Fields*.

It is fully proved that the plaintiff purchased the coal from *Capt. Doane*, at four dollars a ton. But he sold it to *Fields* for five dollars a ton, who advertised it for sale, and commenced retailing it. *Fields* proves, that he was to pay cash on the delivery. He did not pay the cash, and, therefore, the conditions of the sale were not complied with, still it was a sale, and *Fields* could have been forced to comply with the conditions. His judgment creditors had a right to seize the coal, for it might have sold for an advance. *Fields* did not comply with the sale, because the coal was seized, and would have complied but for the seizure. Then the plaintiff sold his coal to a man, who refused to comply with his contract, because the property was seized for his debts. That was his misfortune, and entitled him to a rescision of the sale for non-payment of the price by his vendee, and damages from him. He was entitled to obtain the rescision by suit, but all parties appear to have consented, in effect, to an amicable rescision. The plaintiff preferred it to allowing the property to be sold, judicially, and claiming the vendor's privilege. He, no doubt, acted wisely, but thereby waived all claim for damages for non-compliance with the terms of his sale.

It is not shown that the defendants offered any obstacle to the plaintiff, when he claimed the coal, having learned that he received nothing, on account of the price, from his vendee. The coal was seized the 12th, and released, by bond, the 16th of December. It is difficult to believe, that the plaintiff suffered two hundred dollars damages by that short detention. The defendant, by his answer, in effect, yielded to the release of the seizure. The evidence also justifies the inference that *Batson* allowed *Field*, without objection, to make partial sales and delivery of the coal, and *Ricks* may thus have been misled, when he made the seizure.

If he suffered any damages, they were not immediate, but only consequential from the seizure. The damages arose from selling to a vendee, liable to an execution, and the failure of that vendee to pay the price of the purchase. If he had paid the price according to his purchase, the plaintiff would have suffered nothing.

The judgment of the district court, so far as it decrees the restoration of the coal, be affirmed, with costs. It is further ordered and decreed, that said judgment be reversed as to the damages allowed, and the appellee condemned to pay the costs of appeal.

**BATSON  
v.  
RICKS.**

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**MICHAEL O'LEARY, Administrator, v. THOMAS SLOO, Executor.**

Extracts from books required to be kept by the comptroller of a municipality of the city of New Orleans, although not conclusive of the facts shown by them, are admissible in evidence.

A municipality of the city of New Orleans has the power to order side-walks and gutters, and the proprietors of property in front of which such improvements are made, are liable for two-thirds of the cost of the improvements.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Race and Foster*, for plaintiff. *E. Rawle*, for defendant. The judgment of the court was pronounced by

**PRESTON, J.** The plaintiff sues the defendant for two-thirds of the cost of side-walks, of curb stones and wooden gutters, made and laid in front of his property on Dryades, Terpsichore and Euterpe streets, in the Second Municipality.

By an ordinance of the Council of Municipality Number Two of the city of New Orleans, passed on the 10th of July, 1847, the surveyor of the municipality was authorized to enter into a contract with *Dennis O'Leary*, of whose succession the plaintiff is the administrator, for laying the curb and gutter stones, and brick work of the unfinished side-walks of the municipality, within certain limits between Felicity Road and Triton Walk, in which the property of the defendant is situated, at the rate of one dollar and fifty cents the running foot for the twelve feet banquettes, and one dollar and forty cents for the remainder; two-thirds of the cost thereof to be paid by the proprietors before whose property the side-walks should be laid; and that the contractor should be subrogated to the rights and privileges of the municipality, with power to enforce payment.

|     |      |
|-----|------|
| 7   | 25   |
| 51  | 808  |
| 51  | 1919 |
| 7   | 25   |
| 105 | 409  |
| 7   | 25   |
| 113 | 347  |

O'LEARY  
v.  
SLOO.

On the 6th of August following, a contract was made by the surveyor with *O'Leary*, to perform the work in pursuance of the ordinance.

In pursuance of the contract, the side-walks and curb stones were laid in front and around the property of the defendant. Wooden gutters were also made. A witness, who was clerk of the surveyor and saw the work, proves that it was done, and that it appeared to be well done, and was accepted by the surveyor.

This evidence would be sufficient as to the execution of the work, without the extracts from the surveyor's books, and the bills made out by the comptroller of the municipality, which were offered and received in evidence, notwithstanding the objection and exception of the defendant's counsel. Nevertheless, as the surveyor is required by the ordinances to keep books and make entries embracing the subjects under consideration, and as the comptroller is likewise required to keep books, in which claims against and in favor of the municipality are recorded, there is no violation of the rules of evidence in receiving extracts and copies from those books in evidence, and also bills accurately made from those books, although they may not be conclusive of the facts intended to be proved by them. We consider, therefore, the execution of the work for which payment is claimed, satisfactorily proved. Still many objections are made to the payment.

It is said, the municipality had no power to order side-walks and gutters to be made at the expense of the defendant. As early as 1805, the Legislative Council of the Territory of Orleans, gave to the corporation of New Orleans the power of opening, regulating and improving streets, (B. & C. 96,) and to cause pavements to be constructed in every part of the city. In 1816, this power was more definitely given as to side-walks by the Legislature, by authorizing the corporation to determine the completion and dimensions, the maintenance and repair of the side pavements in the streets, at the cost of the proprietors of houses, lands and neighboring lots. B. & C. 101. Ever since, the making of side-walks with brick and a stone curb and gutter has been regarded as paving, in the law and ordinances. By common consent, it is considered that the term pavement embraces the brick side-walks, of which the curb and gutters form a part. The corporation, therefore, to which the municipality has succeeded, had the legislative power to order these improvements and to impose two-thirds of the expense thereof upon the adjacent proprietors.

It is said, the ordinance requires stone gutters. There is no doubt that the municipality, under both the ordinance and contract, might require stone gutters, but, being satisfied, from some cause through their surveyor who has accepted the work, with wooden gutters, we do not see in the record any good reason for the defendant to complain.

It is strenuously urged, that the defendant is liable for only one-third of the cost of the improvements. The ordinance of 1827 is referred to, which is certainly obscure, but has ever been construed by the municipal authorities to impose two-thirds of the cost of such improvements on the proprietor in front of whom they are made. But however that may be, the ordinance under which the work, which is the subject of this controversy, was done, is very explicit, that two-thirds of the cost of the work was to be paid by the proprietors before whose property the side-walks should be laid.

There is nothing in the seventh section of the act of the 20th of March, 1840, with which this ordinance conflicts. The section refers to the existing laws as



to the payments for pavements in the city. The true and, until lately, general interpretation of these laws is, that the proprietor on each side of the street is to pay one-third of the cost of the banquettes and pavement of the street, and the city the remaining third. The proprietor on each side is, therefore, to pay two-thirds of the half of the work on his side of the street, or one-third of the whole work, and the city the other third of the cost of the whole work.

It is urged, that the contract should have been adjudicated by the mayor to the lowest bidder. That is required by the act of 1850, but it was passed subsequent to this contract. It was also required by a general ordinance in 1836, but that is superseded in this particular case by the special ordinance under which the contract was made. So, also, the general provision authorizing the mayor of the city to make and sign municipal contracts, must yield to the particular ordinance requiring that duty to be performed by the surveyor in this case.

The ordinance and contract are somewhat indefinite as to location, but not so much so as to require, as contended, another ordinance to embrace the defendant's property. Both are more indefinite as to the price of the work. It is agreed that it is to be done "at the rate of one dollar and fifty cents per running foot for the twelve feet banquette, and one dollar and forty cents for the remainder." It appears that the banquette on Dryades street was twelve feet wide, and those on Terpsichore and Euterpe streets, eight feet wide. The defendant contends, that the whole work on Dryades street was to be done for one dollar and fifty cents the running foot, and that on the other two streets at the rate of one dollar and forty cents the running foot. The plaintiff insists that those sums were to be allowed for the banquettes alone, and fifty cents a running foot for the gutters, sixty-five cents a foot for part of the curb, and fifty-five cents a foot for the balance. It is possible that the municipality so intended by their ordinance and contract, and that they may receive such an interpretation against the municipality, as they made both, and are liable to a liberal interpretation in favor of others, in consequence of making the ordinance and contract so loosely. But we cannot enlarge the price of the contract in this manner, by interpretation against the defendant, who was no party to it.

The defendant is liable for two-thirds of the price of two hundred and fifty-five feet nine and two-eighth inches of banquettes, at one dollar and fifty cents the running foot, and two hundred and fifty-five feet nine and two-eighth inches at one dollar and forty cents the running foot, or for four hundred and ninety-six dollars and forty-nine and one-third cents, with legal interest from the judicial demand.

The judgment of the district court is reversed, and judgment rendered in favor of the plaintiff against the defendant, for four hundred and ninety-six dollars and forty-nine and one-third cents, with five per cent interest from the 30th of September, 1850, till paid, and costs in the district court; the costs of the appeal to be paid by the plaintiff.

**Bark TENNESSEE et al. v. J. and J. TARDOS.  
J. and J. TARDOS v. Bark TENNESSEE et al.**

The bark Tennessee on her arrival in New Orleans from Marseilles, delivered a number of casks of wine which had been damaged by grease and water. She had previously carried a cargo of lard to Marseilles, and after discharging, was scraped and limed. On her voyage to New Orleans, she encountered stormy weather, which caused her to leak. *Held*: That the vessel was liable for the damage caused by the lard, but not for that caused by the water.

**A** PPEAL from the First District Court of New Orleans, *Larue, J.* The two suits of the above title were tried together.

The first was brought against *J. and J. Tardos* to recover freight and primage amounting to four hundred and eighty-eight dollars and seven cents. The second was instituted by *J. and J. Tardos v. The Bark Tennessee and Owners*, to recover one thousand one hundred and seventy-nine dollars eighty-three cents, amount of damage done to certain wines which defendants undertook to carry from Marseilles to New Orleans, being the same for which freight and primage is claimed in the first suit.

The petition in the suit of *J. and J. Tardos v. The Bark Tennessee and Owners*, sets forth the following facts: that six hundred quarter pipes of red wine, known as port wine or burgundy, were shipped at Marseilles on board the Tennessee in good condition, to be delivered to the plaintiffs as consignees in New Orleans; that the master and owners failed to fulfill their contract in this; that when her cargo was discharged in New Orleans, two hundred and thirty-three quarter pipes of the wine were found to be discolored and soiled, by grease and sea water, to such an extent as to be unmerchantable.

*Miles Taylor* and *H. H. Taylor*, for appellants. *W. S. Upton*, for appellees. The judgment of the court (*Eustis, C. J.*, absent,) was pronounced by

*Rost, J.* The defendants were the consignees of certain casks of wine brought in the Tennessee, the plaintiffs' vessel, from Marseilles to New Orleans. There were cross suits by the vessel for her freight, and by the consignees for damage to the goods, which suits were consolidated.

Upon the arrival of the casks, they were examined by the port-wardens, who reported a portion of them "to be badly stained, discolored and soiled by grease and sea water," so much so, in their opinion, as to render them "unmerchantable." This condition of the casks is also shown by other testimony. A witness offered by the plaintiffs, on his cross-examination, states that "the casks were very greasy—the grease was running on them." It also appears that such a condition of casks, though it does not injure the wine, affects the sale.

The vessel on previous voyages had carried lard. This article leaks; the flooring and timbers became saturated with it, and it is very difficult to clear the vessel of it entirely. Before the Tennessee took in her cargo, her hold was scraped and limed; but it is obvious from the result, she could not have been entirely cleaned.

Immediately after leaving the port of Marseilles, the vessel encountered very stormy weather, which caused her to leak; and being obliged to carry sail to keep off the land, she laid over a good deal, so that the pumps could not reach

the water she made. The water and grease washed upon the casks, and they became damaged in the manner above stated.

TENNESSEN  
v.  
TARDOS.

It is said, that this was an injury by perils of the sea, for which the vessel should not be charged. So far as the sea water stained the casks, we think the ship should not answer for it. But there was another coöperating cause of damage. The lard in the ship's hold, being washed up with the water, attached itself to the casks and put them in the greasy condition described by the witnesses. The injury of the casks was directly promoted by the greasy condition of the ship. If the ship had been clean, the injury would have been different in its character, and as we may fairly infer from the evidence, less in its pecuniary amount. We are forbidden, therefore, to attribute the whole damage to perils of the sea; on the contrary, we must set a portion of it down to the defective condition of the vessel, and the vessel must answer for such damage as was occasioned by that defect.

Let us take a parallel case by way of illustration. The vessel is undoubtedly answerable for the damage attributable to bad stowage. Suppose a vessel so stowed that the goods would be safe in ordinary weather, but for want of proper dunnage, would suffer in a gale of wind. A gale occurs, causing the vessel, which before was tight and strong, to spring a leak, and the goods are injured by contact with salt water. But in addition thereto, they get knocked about in the vessel's hold and broken, and this damage, under the evidence, is clearly attributable to bad stowage, and would not have occurred if the stowage had been good. The ship would not be liable for the damage by salt water; but it would be clearly unjust to exempt her from the damage arising from bad stowage.

We consider an allowance of two dollars per cask as sufficient to cover the proportion of damage occasioned by grease, which deducted from the freight, will leave a balance of twenty-two dollars and seven cents in favor of the ship.

It is therefore decreed, that the judgment of the district court be reversed, and that the said *Horatio Eagles*, *William N. Hazard* and *Albert Cook*, receive from the defendants, *J. and J. Tardos*, the sum of twenty-two dollars and seven cents, the plaintiffs to pay the costs of the appeal; the costs of the proceedings in the court below, hitherto incurred, to be borne equally by the parties, and the costs of executing this decree to be paid by the defendants.

### KELLAR v. MERCHANTS' INSURANCE COMPANY.

A mortgagee has unquestionably an insurable interest in the property mortgaged.

Where a mortgagee upon a house and lot insures the building against fire, in case of the destruction of the building, quere, 1st. Whether the Insurance Company have not the right to insist upon the lot contributing to the satisfaction of the mortgagee's debt? 2d. Whether the Insurance Company upon paying the amount of the insurance, have not the right to insist upon a subrogation to the mortgagee's rights?

APPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Hoffman* and *Ogden*, for plaintiff. *Levi Pierce*, for defendants. The judgment of the court (*Preston, J.*, absent,) was pronounced by

SLIDELL, J. This is an action upon a policy of insurance, by which the

**KELLAR** defendant did "insure *John Kellar* against loss or damage by fire, to the amount of fifteen hundred dollars, on a two story frame house, situate on lot No. 138, fronting on Pensacola landing, New Basin, amount of nine hundred dollars—  
**INSURANCE CO.** on a two story old house in the rear thereof, and on a stable and shed on lots Nos. 137 and 138, amount of six hundred dollars ;" and the company did thereby "promise and agree to make good unto the said insured, his executors, administrators and assigns, all such loss or damage not exceeding in amount the sums hereby insured as shall happen by fire to the property as above specified, during six months, to wit, from the 15th November, 1849, at 12 o'clock at noon, unto the 15th May, 1850, at 12 o'clock at noon, the said loss or damage to be estimated according to the true and actual value of the said property at the time the same shall happen," &c. The buildings were destroyed by fire within the time covered by the renewal of the policy.

It appears from the evidence, that the plaintiff was not the owner of the property. His interest, if any, was that of a mortgagee, by virtue of a conventional mortgage, and a judicial mortgage which he alleges he held upon the property assured. That a mortgagee of a house has an insurable interest in the property mortgaged, is unquestionable. Whether such interest is covered by the naked terms of the policy in question, is a question not raised in argument here, and as it seems to be waived by the defendants, we express no opinion upon it. We shall confine our inquiries to the points presented by the counsel for the defendants.

The district judge gave the plaintiff judgment for a total sum of \$1400, based upon two items, to wit: one-half of a judicial mortgage claimed in favor of the succession of *Sarah Baum v. Martin*, the owner of the property insured, which claim was afterwards secured by a conventional mortgage—\$493 65; one-half of a judicial mortgage claim in favor of the succession of *Mann v. Martin*, \$903 50—\$1407 15. He considered the value of the buildings insured, as proved, to be \$1400.

The defendants do not contest here the right of the plaintiff to recover under the policy, so far as the one-half of the *Baum's* judgment is concerned. But they oppose the allowance of the second item as unsupported by sufficient evidence. This item rests principally upon the testimony of a witness whose credibility is disputed. The district judge believed him, and there is no evidence before us which would authorize us to say that the witness was unworthy of belief. We are not able to say upon the evidence, that the interest acquired by *Kellar* in the *Mann* judgment, was even so divested as to affect his insurable interest. The last point made by the defendant's counsel is thus presented in the written argument: "But supposing he has legal mortgages on the two lots and the buildings to the amount of \$1400, shall he be allowed the whole \$1400 because the buildings are destroyed, and shall the two lots be freed from contribution and the mortgages on them be raised, or should there not be a fair division, or, at least a transfer of *Kellar's* interest in these two mortgages be required to be made to the company, before they are compelled to pay anything at all."

If this point had been properly presented in the court below, and it had appeared by evidence that *Kellar* had collected anything from the debtor who owed the mortgage debt, or from the ground mortgaged, or if the company had tendered payment of the \$1400 and demanded a transfer or subrogation *pro tanto*, it would have been proper for the court below to consider the question now raised here. But as the case stands, we do not think the question should be raised here for the purpose of a reversal or amendment of the judgment.

If there is, in a case of this sort, a right of subrogation, or, if not a right of subrogation technically speaking, an equitable right to have *Kellar's* interest in the claims enforced against the debtor and against the land mortgaged for the benefit of the Insurance Company, that right is not impaired by the present decree. Take the case of an underwriter on a missing ship, who is sued for a total loss and has judgment against him accordingly, *en pays*. If the ship reappears, he gets the benefit of it, although the decree gave no express subrogation to the rights of the assured.

Whether there is any such subrogation or equity as is claimed in this case, we do not consider ourselves now called upon to decide. But it is not improper to remark, that the pretensions of the defendants are by no means unworthy of consideration. We have not met with any decided case expressly in point, but there are decisions which, by analogy, give countenance to those pretensions. See *Randal v. Cochran*, 1 Vesey, 98, cited. Park, 190. *Babes v. White*, 4 Bingham, N. C. 272. *Goodsal v. Baldero*, 9 East, 71.

Judgment affirmed, with costs.

KELLAR  
v.  
MERCHANTS'  
INSURANCE Co.

### SAMUEL PACKWOOD v. J. L. WHITE et al.

Where the parties had agreed upon a compromise, a stipulation of which was, that the defendant should pay the plaintiff ten thousand dollars in cash, and the defendant having complied with the other stipulations, expressed his inability to pay that sum in cash, but offered five thousand dollars in lieu thereof, which amount was placed in the hands of an attorney to be paid if the offer was accepted, the plaintiff having taken the same under the circumstances without any objection, will be considered as having accepted the offer.

Parties are at liberty to admit parol evidence of a contract for land, and if they do so, the court will give effect to the same.

When, as a part of a compromise, a judgment is confessed, the conditions of the compromise may be shown by any legal evidence; and such evidence will not be considered as controlling or limiting the effect of the judgment.

**A**PPPEAL from the First District Court of New Orleans, *Larue, J. A. Hennen*, for plaintiff. *L. Janin*, for defendants. The judgment of the court, (*Preston, J.*, absent,) was pronounced by

**ROST, J.** On the 23d of December, 1850, the defendants confessed judgment in favor of the plaintiff, for fifty-one thousand eight hundred and four dollars and ten cents, besides interest, on certain promissory notes given for the first installments of the price of the Myrtle Grove Plantation, which they had purchased from him. On the same day a writ of *fi. fa.* issued, under which the crop of sugar was seized, day by day, as it was gathered, and shipped by the sheriff, for sale, to *Messrs. W. and J. Montgomery*, the firm agreed upon for that purpose, between the plaintiff and defendants. This writ was returned after the crop had been secured, and on the 11th of February following, an *alias fi. fa.* issued, on which the plantation and slaves were seized.

To arrest the sale under this writ, the plaintiff being a non-resident of the State, the defendants filed a bill in chancery in the Circuit Court of the United States, alleging an agreement of the plaintiff to give them three years time to pay the debt, on certain conditions, with which they have strictly complied; and further, that the judgment confessed by them, was confessed for the only purpose of securing the execution of this agreement, by preventing the seizure of the crops under execution, at the suit of other judgment creditors.

PACKWOOD  
v.  
WHITE.

The plaintiff then applied to the State court from which the writ had issued, to arrest the proceedings in chancery, and after much litigation, the parties entered into an agreement, under which the bill in chancery was dismissed, and all the issues made in the Federal Court were brought before the State court for adjudication. Those issues form the subject of the present controversy.

The district judge recognized the existence of the agreement set up by the defendants, and after crediting the execution with the net proceeds of the last crop shown to have been received by the plaintiff, he enjoined the sale of the plantation and slaves. The case is before us on the appeal of the plaintiff.

It is clearly proved, that the plaintiff originally agreed to stay proceedings for three years, from the 7th of March, 1850, on the following conditions: 1st. That the defendants should give him satisfactory security for the delivery of the crops during those three years. 2d. That said crops should be consigned for sale to *Messrs. W. and J. Montgomery*, or such other factor as he might select, and that the proceeds, after paying expenses, should be exclusively applied to the payment of his debt. 3d. That the defendants should pay him the sum of ten thousand dollars.

It is further shown, that the plaintiff had entire confidence in the management of the defendants, and that as long as he received the crops, he preferred to leave the plantation under their control, than to sell it for the payment of his claim.

The defendants furnished satisfactory security for the forthcoming of the crops, and made arrangements with *Messrs. W. and J. Montgomery*, who agreed to act as their factors; but they were unable to comply with their promise to pay ten thousand dollars, and placed five thousand dollars in the hands of *Mr. Benjamin*, the common friend of the parties, to be offered to *Mr. Packwood*, in lieu of the ten thousand dollars promised; this being the largest amount they could raise. When this sum was offered to the plaintiff, he first objected to the change in the terms; appeared to think himself unsafe with so small a payment; and expressed regret at having subrogated *Mr. Milbank*, a creditor of the defendants, to a part of the vendor's privilege and mortgage, because it exposed him to have the plantation seized and sold during his absence at the north. To obviate this difficulty, at the suggestion of *Mr. Benjamin*, an agreement was procured from *Mr. Milbank*, by which he bound himself not to proceed on his mortgage for one year, and for such further time as would be necessary to give the plaintiff reasonable notice that he meant to enforce it. After this agreement had been obtained and delivered to the plaintiff, he and the defendants met together at *Mr. Benjamin's* office, and *Mr. Benjamin* paid over to the plaintiff the five thousand dollars in his hands. The plaintiff then considering the arrangement completed, told the defendants, "we must settle with *Mr. Benjamin* for his fee, and we must divide it." *Mr. Benjamin* declined receiving any fee. Had this witness not declined to testify, so far as he had been consulted as counsel, his testimony would have been much more explicit; but what he has stated, is too transparent to conceal the facts which he was in duty bound to withhold.

It was said in argument, that the receipt given by the plaintiff was simply on account of the amount due him for the price of the plantation, and had no reference to any agreement. Such a reference was unnecessary. *Mr. Benjamin* was instructed to offer the five thousand dollars to him, in place of the ten thousand dollars originally promised, and as he received it without any reserva-

tion, after obtaining a stay of proceedings from *Milbank*, he must be held to have ratified the change in the original agreement proposed by the defendants through *Mr. Benjamin*.

The testimony of *Mr. Milbank* is conclusive, that the only consideration moving him to grant a stay of proceedings, was the agreement of *Mr. Packwood* not to procede under his mortgage for three years, and it is clear that the pretensions of the plaintiff, if sustained, would operate a surprise and perhaps a serious injury to him.

It is urged by the plaintiff's counsel, that the agreement relied on, should be shown by at least one witness and corroborating circumstances. We think it is proved by the concurrent testimony of many witnesses, by the acts and declarations of the plaintiff himself, and by the fact, that as long as it suited him to do so, he availed himself to the utmost of every stipulation which it contained in his favor. His offer to divide the fee, which he considered due to *Mr. Benjamin*, for having completed the arrangement; his statement to *Mr. Staunton*, the security for the forthcoming of the crops, that he was satisfied he would now get them; and his expressions of unmingled satisfaction, to this witness and others, for the amicable arrangement he had made with the defendants, can leave no doubt of its existence in unprejudiced minds.

It is equally clear from the evidence, that the judgment under which the plantation and slaves have been seized, was confessed by the defendants, for the sole purpose of securing the execution of this agreement, by enabling the plaintiff to keep in the hands of the sheriff, an execution which would give him a privilege upon the crop as it was gradually separated from the soil, and thus protect him from seizure by other judgment creditors of the defendants. The impressions of *Mr. Bradford* are clear, distinct and unequivocal, that this was the only object the parties had in view, and the circumstance that he consented to act as the legal adviser of both in obtaining the judgment, would alone satisfy us, that there was no contest between them, and that the judgment was not intended to change their previous position towards each other.

The defendants would never have suffered execution to issue, as it did on the day the judgment was rendered, if the object of it had been to enforce the sale of the plantation and slaves. Nothing of the kind was attempted. The sheriff seized the crop under it, daily as it was made, but instead of selling it, he was directed by the plaintiff to send it to *Messrs. W. and J. Montgomery* for sale, under the agreement, and it was so sent and sold; nay, the plaintiff executed the agreement beyond his promise, by becoming the surety of the defendants for the reimbursement of the advances which *Messrs. W. and J. Montgomery* agreed to make to them.

The plaintiff having had the full benefit of the agreement, cannot now be permitted to repudiate it. Whether it be advantageous to the defendants, or the reverse, is a matter for their consideration. It is said that they are insolvent, and that the agreement is no longer binding on that ground. But, as the plaintiff told one of the witnesses that he never expected they would be able to comply with their contract, it was the purchase of the plantation which made them insolvent, and their situation at the time the agreement was entered into, was the same as it is now.

It is urged in the supplemental brief of the plaintiff's counsel, that the agreement alleged is a variation of the original contract of sale; that it should, as the sale itself, be in writing, and that no parol evidence of it ought to be received.

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v.  
WHITE-

This question has been fully considered in the case of *Lockett v. M<sup>r</sup>. Tobey*, 7th Ann., on the application for a re-hearing, and after mature deliberation, we have adhered to the settled jurisprudence of the State, that the parties are at liberty to admit parol evidence of a contract for land, and that, if they do, we will give it effect.

We have been warned of the danger of attempting to control or limit the effect of a judgment by parol evidence; but this is nothing more than a judgment confessed, forming part of a compromise, the conditions of which may be shown by any legal evidence to which the parties do not object. *Union Bank v. Marin*, 3d Ann. 34. *Delabigarre v. Municipality*, Number Two, 3d Ann. 237. We are of opinion that the judgment must be affirmed.

Affirmed, with costs.

### SUCCESSION OF MRS. E. H. DORSEY.

Where the endorser pays a judgment, which has been rendered both against himself and the drawer, he is subrogated by law to the rights of the judgment creditor. C. C. 21, 57. Where an endorser has been legally subrogated, by payment of a judgment to the rights of the creditor against the drawer, the note is merged in the judgment, and is not barred by the prescription applicable to promissory notes.

Where the endorser has been subrogated to the rights of a judgment creditor, against a married woman who was the drawer, she will not be permitted to set up the defence against the endorser, that the note was given for the benefit of her husband. This defence should have been urged against the suit in which judgment was rendered against her. If she has a good defence against the endorser, which could not have been urged against the holder, it is her duty to allege and establish that defence by evidence.

**A**PPPEAL from the Second District Court of New Orleans, *Lea, J.* The judgment of the district court was as follows:

"This case comes up on the oppositions made to the account filed by the executor, by *H. Lockett* and *J. L. Gaienné*. The claim of *H. Lockett*, for one hundred dollars, is sustained by the evidence. The only question to be determined, is whether *L. R. Gaienné* is subrogated to the rights of *J. L. Florance*, as a judgment creditor of the deceased. It appears, from the evidence, that *L. R. Gaienné* was endorser upon a note drawn by the deceased, duly authorized. On this note judgment was obtained by *J. L. Florance*, the holder, against the deceased, *Mrs. Dorsey*, and *L. R. Gaienné*. Execution was issued against *L. R. Gaienné*, who paid the judgment.

"I shall not consider the question of conventional subrogation, as this ground has been abandoned in the argument, but shall confine my opinion to that of legal subrogation.

"*Gaienné*, the endorser, paid the debt for which he was bound with *Mrs. Dorsey*, and, so far as the evidence shews, for *Mrs. Dorsey*, and which he not only had an interest in discharging, but which he was compelled to discharge under process of execution. See Civil Code, 2157, sec. 3. It is urged in argument that this payment does not, under the circumstances, constitute a subrogation. First, because the maker might have a defence against the endorser which could not be set up against the holder, such as that the note was



made for the payee's accommodation, as is frequently the case. This undoubtedly might be the case, but it is neither alleged nor proved in the present case; it is merely suggested as possible, but this is not sufficient; such a defence may possibly exist against any payee or endorser of a note who has been compelled to take it up, but, to be available, it should be alleged as matter of defence, or, at least, it should be disclosed by the evidence. An endorser who pays a note, is *prima facie* subrogated to all the rights of the holder.

SUCCESSOR OF  
DORSEY.

"The second point urged, is that the opponent's right is an action on the note which he has paid; that he is not subrogated to judgment; that, as holder of the note, the right of action is barred by the prescription of five years, which is specially pleaded. If the subrogation was complete, the endorser had a right to stand in the shoes of the holder to whom he paid, without prejudice, however, to the defendant's right to urge matter of defence, strictly personal as against the endorser, which has not been done.

"Lastly, it is urged that it should appear affirmatively that the consideration of the note inured to *Mrs. Dorsey's* benefit. This should have been urged on the trial of the case, before judgment rendered, or after judgment, upon appeal. It is not competent for this court to inquire into the validity of a judgment rendered nearly ten years ago by the city court.

"It is ordered, adjudged and decreed, that the tableau filed herein be so amended as to place the name of *Henry Lockett* thereon, as a creditor in the sum of one hundred dollars, and that of *L. R. Gaienné*, in the sum of eight hundred and fifty-three dollars and fifty cents, with interest thereon at the rate of ten per cent per annum, from the 4th November, 1841, till paid, with five dollars cost of protest, and forty dollars and thirty-seven and a half cents costs of suit."

The following statement of facts was agreed upon by the parties:

*J. L. Florance* instituted suit against *Mrs. Dorsey* and *L. R. Gaienné*, in the City Court of New Orleans, on the 12th November, 1841, on a promissory note for \$853 50, bearing ten per cent per annum interest from maturity till paid. The note was made by *Mrs. Dorsey*, with the consent of her husband, to the order of, and endorsed by *L. R. Gaienné*, in blank. The note matured on the first November, 1841. *Mrs. Dorsey* filed her answer on the 26th November, 1841. There is nothing in the record to show that this answer was filed with the consent of her husband, or that he authorized her to appear and defend the suit.

Judgment by default was taken against *Gaienné*, and confirmed on the 3d December, 1841.

On the 8th December, 1841, judgment was rendered against *Mrs. Dorsey* for the amount of the note.

Separate judgments were given against *Mrs. Dorsey* and *Gaienné*, and separate *fi. fas.* issued against them.

On the 25th April, 1842, a *fi. fa.* issued against *Gaienné*, and was returned on the 24th May, 1842, "satisfied."

*L. R. Gaienné* assigned all his rights in the judgment to *O'Grady*, subrogating him thereto, and *O'Grady* made a similar assignment to *Mrs. Gaienné*.

The answer filed by *Mrs. Dorsey* is in the following words: "that said note was given by her without consideration." She received, but for the benefit of her husband, which was the amount of a judgment obtained by said *Florance* against her husband, and prays to be dismissed.

The case was regularly set for trial. On the trial, *Mrs. Dorsey* did not

**SUCCESSION OF DORSEY.** appear, either in person or by counsel. Her answer was filed by an attorney at law.

*H. Lockett*, for the opposition, contended as follows : The counsel have agreed on a statement of facts, filed in the record of the case, and is printed by the appellee in this his brief.

In November, 1841, *J. L. Florance* instituted suit against *Mrs. E. H. Dorsey*, upon a promissory note signed by her, with the consent of her husband, payable to *L. R. Gaienné*, who endorsed it to *Florance*. Judgment was obtained against *Gaienné*, and *Mrs. Dorsey*. Separate judgments. In April, 1842, a *fi. fa.* was issued, separately, against *Gaienné*, and was returned satisfied. The record of the suit against *Gaienné* and *Mrs. Dorsey*, in the late city court, was introduced, without objection, to show the quality in which *Gaienné* paid the money, now in controversy, to wit, as endorser. The payment of *Gaienné* of the *fi. fa.* under the judgment, was a payment of the judgment, and by that payment he became, at the date of the payment, subrogated to *Florance* in all his legal rights as a judgment creditor against *Mrs. Dorsey*. Civil Code, art. 2157.

In the statement of facts, the court will find the answer of *Mrs. Dorsey* to the suit brought by *Florance* against her, in which she pleaded that the debt was contracted for the benefit of her husband, and not for her own, and it did not inure to her benefit. The suit was tried, and a judgment was rendered against *Mrs. Dorsey* under this issue ; a separate judgment.

*Mrs. Dorsey* died in 1846, and left *G. Dorsey*, her husband, executor. He, in his capacity as executor, filed an account of his administration, which is in the record, and omitted to place *Gaienné*, on the account, as a creditor. *Gaienné* filed an opposition, and prayed to be placed on the account, as a creditor, on the ground that he, as endorser, had paid the judgment, and was thereby subrogated to all the rights, &c. of *Florance*. At the trial of opposition, the judge below decided, that *Gaienné* was, by the fact of this payment, subrogated to the rights of *Florance*, and decreed that he should be placed on the account as a creditor of the estate, for the amount of the judgment, to wit, eight hundred and fifty-three dollars and fifty cents, with ten per cent per annum from the 4th November, 1841, the date the note fell due, till paid. From this decision the executor has taken this appeal.

The Civil Code, art. 2157, is clear in favor of the opponent. The decisions of this court, on the point of subrogation, are equally clear, and are so numerous as to dispense me with referring to more than one or two of them. *Howe v. Fraser*, 2 R. R. 424.

The appellant filed no answer to the opposition; perhaps he was not bound so to do. But in his argument below, and in his brief, printed and filed in this case, he says that if *Gaienné* was subrogated, he was subrogated to this note, which is barred by prescription. This is hardly worth noticing. If there be a subrogation, it is to the judgment, or nothing. The note was merged in the judgment. I do not suppose that there is any prescription against the judgment.

The appellant next says, that it does not appear from the record, that *Mrs. Dorsey* was authorized by her husband to file the answer she made to the suit of *Florance* ; that she did not appear personally, or by counsel, at the trial of the case, although her answer was filed by an attorney at law, and therefore she is not bound to pay *Gaienné* ; and pretends to set up the same plea she did against *Florance*.

Now the appellee contends, that if he be subrogated, he stands in the shoes of *Florance*. In one word, he is, in law, *Florance*. That if *Florance* had filed this opposition, *Mrs. Dorsey* could not again set up the plea she made in the suit of *Florance* against herself in the late city court. It is *res judicata*. The presumption is, that all the proceedings were legally conducted, and that the judgment was properly rendered, and she is now debarred from again contesting the validity of that judgment. She should have instituted her action of nullity, within the time allowed by law, which is now long past. If this plea could not be set up against *Florance*, it cannot be against *Gaienné*.

This is the view taken by the judge below, and on that ground he decided against the executor. I refer the court to his opinion, which is quite minute and in detail. The record is a very short one.

In the statement of facts, the court will find an admission, that *Mrs. Gaienné* is subrogated to all the rights which *Florance* had against *Mrs. Dorsey*, and

G. R. Gaienné in prosecuting this claim, as tutor to his minor children, and as SUCCESSION OF DORSEY. administrator to his wife's estate.

The executor makes a strange argument: He contends that *Gaienné's* claim is upon the note, and not on the judgment. It has always been supposed that a judgment rendered on a claim, merges the claim, and extinguishes it at once. There is but little probability that your honors will change the rule on that subject, for the benefit of the executor, in this case.

But, says he, *J. L. Florance* was a *bond fide* holder for a valuable consideration, and no defence could be set up by *Mrs. Dorsey* against him. A defence could be set up though, he says, against *Gaienné*.

Both these propositions are erroneous. If *Mrs. Dorsey* had a defence based upon the fact, that the consideration did not inure to her separate advantage, she could have urged it against all the world. The note, under these circumstances, being originally void, no number of transfers could give it validity. Again, *Gaienné* being endorser, in which capacity he paid the judgment rendered against him on her note, became, *prima facie*, her creditor. If she had any defence against *Gaienné*, it should have been established, when the opposition was tried. The question as to whose benefit the note was given, was closed by the judgment for ever.

*P. E. Bonford*, in behalf of the executor, contended: The executor's account in this case, is opposed by *L. R. Gaienné*, as administrator of his wife's succession, on the ground that he is, in that character, a creditor of the succession of *Mrs. Dorsey*, and should have been placed as such upon the tableau of distribution.

The circumstances upon which this claim is founded are these: The decedent, with the consent of her husband, made a promissory note to the order of the opponent for the sum of \$853 50, with interest at the rate of ten per cent per annum, from maturity until payment. The note matured on the 4th of November, 1841, and was not paid.

*Florance*, the holder, sued the decedent and *L. R. Gaienné* in the City Court of New Orleans. The defendants severed in their answers. Judgment was rendered against *Gaienné* on the 30th November, 1841, and against *Mrs. Dorsey* on the 8th of December following.

An execution was issued against *Gaienné*, which was returned by the sheriff on the 25th of April, 1842, satisfied, the amount thereof having been paid by *Gaienné*. On the 19th of December, 1842, *Florance* made a conventional transfer of all his rights against *Mrs. Dorsey* to *L. R. Gaienné*, who subsequently conveyed the same interest to *John C. O'Grady*. *O'Grady* sold the claim thus acquired to *Mrs. L. R. Gaienné*.

Upon these facts, it is insisted by *Gaienné* that he was both legally and conventionally subrogated to the judgment of *Florance* against the decedent; conventionally, by the contract of the 19th of December, 1842; legally, because he was endorser on the note, of which *Mr. Dorsey* was the maker, having as endorser taken the note up, he thereby became entitled in law, and was invested with all the rights, actions and securities which the holder possessed at the time of the payment.

So far as the claim is based upon the conventional subrogation, it is very easily disposed of. *Florance* had been paid in April, 1842. From the day the payment was made, he ceased to have any rights upon the note, or upon the judgment he had obtained against the several parties to it. For though a party may have two or more judgments against different persons on the same obligation, he can have but one satisfaction.

On the 19th of December, 1842, therefore, he attempted to convey what he did not own. He had not then any claim against *Mrs. Dorsey*. He could not have issued execution against her upon his judgment, because his rights as holder, had been extinguished in the April preceding by the payment made by *Gaienné*, the endorser. Consequently, it is evident, as there was no subrogation at the time of the payment, there could have been none afterward. See Civil Code, art. 2156.

Was *Gaienné* legally subrogated in April, 1842, to *Florance's* judgment against *Mrs. Dorsey*, by satisfying the judgment which *Florance* had obtained against him? It is said he was, and his case is alleged to be embraced in the third paragraph of article 2157 of the Civil Code, and that being bound jointly with *Mrs. Dorsey*, and for her, and having an interest in discharging the debt, he became subrogated of right to the creditor's rights, actions, privileges and mortgages. See article 2157.

**SUCCESSION OF DORSEY.** To sustain this position, *Gaienné* must prove the debt he paid was a debt which he had incurred for, or on which he was bound jointly with *Mrs. Dorsey*.

How has he undertaken to prove this? By the production of the note itself, which shows on its face it was made by *Mrs. Dorsey*, payable to *Gaienné's* order. If *Mrs. Dorsey* had not been a married woman at the time this note was made, we freely admit a presumption would arise on the note itself, that she was ultimately bound for its payment. But what we insist upon is, that in the case of a note made by a married woman, not only is there no such presumption that she is bound to the payee, but in fact the presumption is the other way, that is, that she is not so bound. For the signature of the wife to an obligation is an evidence of indebtedness, not by her, but by the community, as all acquisitions which are made by her, or in her name, during the marriage, are considered not to inure to her benefit, but are held to belong to the community; so all obligations which are entered into by her, are held to be not her own personal obligations, but the obligations of the community.

In order to hold her separate estate liable, the creditor must prove, affirmatively, that the consideration of the obligation inured to her separate advantage. The presumption on the face of the obligation itself is, that it did not; for the presumption is, that what was acquired as the consideration of the obligation belongs not to her, but to the community.

This principle has been recognized by repeated decisions, and is now too firmly fixed in the jurisprudence of the State to be shaken. See the following cases: *Pascal v. Saurinet*, 1st Ann. 48. *Erwin v. McCalop*, 5th Ann. 173. *Exchange Company v. Bein*, 12 R. R. 579.

The endeavor is made to draw a distinction between the present case and those cited in this; that in those cases, it is affirmed there was a special denial on the part of the married woman of her indebtedness, and that here, there is no such special denial.

To this we answer, that those cases do not go upon the fact, that there was a special defence. If an attempt were to be made to confirm a judgment by default against a married woman, simply upon the proof of her signature to an obligation, we hold the law to be, that such proof would be insufficient, as clearly as if the attempt were made to hold an endorser, without proof of demand, or notice of non-payment. It is a constituent part of the plaintiff's demand, without which his proof is incomplete, to show that the consideration inured to the separate advantage of the wife. When he has proved her signature, all he has proved is a debt of the community. He must go further in order to fix her liability.

But a little attention to the form in which the present controversy arises, will show that the objection, even if well founded, does not apply to the present case. Here the executor has filed his account. A person claiming to be a creditor opposes it. Now the settled rule of practice is, that the executor is considered as the plaintiff in the issue. He is not required, nor is it the practice for him to file an answer to the opposition: so that this case is wholly unlike that of an action instituted against a married woman, in which it might be necessary for her, in order to raise her defences, to plead regularly to the petition.

The judge of the court below decided in favor of the opponent. He held, that the representative of *Mrs. Dorsey* was precluded, by the judgment in the suit of *Florance* against her, from denying that she was personally bound upon the note, or that its consideration inured to her separate benefit.

It is submitted that this view of the effect of the *Florance* judgment in the issue between *Gaienné* and *Mrs. Dorsey's* succession, assumes the very point in controversy; for it must first be determined that *Gaienné* is subrogated to *Florance* on that judgment, before it can have the effect of *res judicata*, in any issue between him and the decedent. Otherwise, a cardinal element is wanting in the case to give such an effect to the judgment, that is, an identity of the parties in the two issues. It is obvious that, as between herself and *Florance*, *Mrs. Dorsey* may have had no defence upon the note, while she might have had a perfect one as against *Gaienné*. Suppose, in point of fact, she had made the note for *Gaienné's* accommodation, could *Gaienné* have maintained with any show of success, that on the payment by him to *Florance*, he had become subrogated to *Florance's* judgment against her? And yet, such seems the necessary consequence of the views expressed by the judge of the inferior court. *Mrs. Dorsey* may very well have had a defence to *Florance's* action,

which, as against him, he may not have thought it proper to raise. He was an innocent third party, a *bona fide* holder for a valuable consideration; but the effect of a failure to set up a defence to *Florance* could not go beyond that suit or conclude her, except as to the plaintiff in it. As to all other parties, and in all other issues, the question would always be an open one; one which it would be perfectly competent for her to raise, notwithstanding the judgment; as between herself and *Gaienné*, the latter, before he can claim the right of subrogation, must first establish that he paid the debt for her. This is matter *en pais*, to be made out by the production of the proper proof. The judgment against *Mrs. Dorsey* is not the proper evidence of it. That judgment, in so far as this controversy is concerned, is *res inter alios acta*. Besides, that judgment decides nothing, as between *Gaienné* and *Mrs. Dorsey*; it leaves their rights and relations to be settled in a future controversy.

The true position in which we conceive *Gaienné* to stand in this matter, is this: If this be, as he alleges, a case in which the decedent was bound to reimburse him on his payment of the note, he became entitled, by such payment, to an action upon the note. In this view, we insist his action is barred by the prescription of five years.

We have conceded thus far, that if the opponent were actually entitled to be subrogated in law to *Florance's* rights, he would thereby have become subrogated to the judgment; but there is very strong reason to suppose that such is not the necessary result of the legal subrogation. Mr. Burge puts a case identical with the present, in which such a pretension was raised without success. See Burge on Suretyship, 353; and to the same effect is the decision of this court, in the case of *M'Kee v. Amonett*, 6th Ann, 209.

The judgment of the court (*Slidell, J.*, absent,) was pronounced by

ESTIS, C. J. For the reasons assigned by the district judge, judgment affirmed, with costs.

### COLLINS and BRUFF v. HUGH DUFFY.

An attachment creates no privilege against the succession, where the debtor subsequently dies in this State, and his estate is administered upon here, as the place of his residence.

**A**PPEAL from the District Court of Lafourche, *Randall, J. J. L. Cole*, for plaintiffs. *J. C. and A. Beatty*, for defendant. The judgment of the court (*Slidell, J.*, absent,) was pronounced by

PRESTON, J. This suit is commenced by attachment, and is brought on a store account and promissory note. A motion was made to dissolve the attachment, but did not prevail. The defendant died during the pendency of the suit, and an administrator was appointed to his succession. He answered by a general denial of the allegations in the plaintiffs' petition. Judgment was rendered in favor of the plaintiffs, also decreeing to them a privilege upon the property attached, and ordering it to be sold to satisfy their judgment. The administrator of the succession has appealed. He contends, that the law gives the plaintiffs no privilege by virtue of their attachment alone, and that the property should not be sold exclusively for the satisfaction of their judgment.

We take it for granted, that the original defendant died in this State, and that the administrator was appointed to his succession by our courts, because that is to be presumed until the contrary appears. Now, in such a case, our codes direct that all the creditors of the succession shall be ascertained (art. 1126); that a classification of their claims shall be made by the court after public notice, and between the creditors contradictorily with each other (arts 1167, 1168, 1169; Code of Practice, arts. 988, 993); until which time no payment of ordinary claims shall be made.

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The attachment gives no privilege upon the property attached, and in case of the death of the debtor and the appointment of an administrator in this State, the law directs it to be administered as we have stated. We do not deem it necessary to decide what would have been the effect of the attachment, if the defendant had actually been a non-resident and had died out of the State.

It has indeed been often held, that process of attachment subjects the property attached to the payment of the attaching creditor. But the principle supposes that the debtor has the possession of his other property for his other creditors. If he has made a cession of all his property to all his creditors, it has been always held, that the property attached follows the cession, that the attaching creditor has no preference, but the syndic must distribute its proceeds equally among the creditors, if there be no lawful cause of preference. So, in the case of the death of the debtor and the appointment of an administrator, he is entitled to the possession and administration of all the property of the deceased. He sells and reduces it to money. If there is enough to pay all the creditors, no contest between them can arise. If there are not funds sufficient to pay all, the estate is insolvent; the attachment gives no privilege. The codes direct the administrator to have a classification of the debts made by the court, and judgment of distribution among the creditors contradictorily with each other. And in rendering the judgment, the law does not allow the attaching creditor a preference merely on account of the attachment, but directs an equal distribution among all the creditors who have no preference growing out of the nature of their debts.

Judgment should have been rendered for the amount due to the plaintiffs, to be paid in the due course of administration of the estate of the deceased, but without privilege, as none grew out of the nature of the debt, or was conferred by the proceedings in the case.

The judgment of the district court is reversed, and judgment rendered in favor of the plaintiffs against *Emèle Leonval*, administrator of *Hugh Duffy's* estate, for the sum of fifteen hundred and fifty-two dollars forty-six cents, with five per cent interest from the 17th day of May, 1851, and costs of suit, to be paid in the due course of administration of the estate. The appellees to pay the costs of appeal.

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#### THE STATE v. THOMAS C. CHEEVERS.

A person cannot be twice tried for the same acts; and where there were two indictments against a prisoner for the same acts, one charging him with having committed a grievous assault, and the other for putting out an eye of another person, a trial and conviction for the first offence is a bar to a trial for the second.

**A**PPEAL from the District Court of Assumption, *Randall, J.* *G. C. Raby*, District Attorney, for the State. The judgment of the court (*Slidell, J.*, absent,) was pronounced by

**PRESTON, J.** On the 18th of March, 1851, the grand jury of the Parish of Assumption found two bills of indictment against the defendant, one for striking, beating, wounding and bruising *James Dailey*, and one for putting out the eye

of *Dailey*. Both acts were charged to have been done on the 21st of December, 1850.

The accused was tried and found guilty of the assault and battery, and, in fact, the court, in passing sentence upon him, gave as a reason for inflicting a severe punishment, that the evidence showed a grievous injury to the person of *Dailey*, in depriving him of the sight of his right eye.

The district attorney, however, between the conviction and sentence for the assault and battery, caused the accused to be arraigned on the indictment for putting out the eye. The accused, by his counsel, plead in bar to this prosecution, his trial and conviction for the assault and battery, and set out, minutely, the acts charged in the first indictment, to show that they were the same with those charged in the second, and averred that, in point of fact, they were the same, and that the evidence which might be given to support this indictment, would be sufficient to convict him of the assault and battery. He offered, further, to prove that the acts and facts proved on the trial of the first indictment, were the same charged in the second.

The district attorney demurred to the plea; the court overruled the demurrer, sustained the plea, and the State has appealed.

The demurrer admitted that the accused, having been tried and convicted of a lesser offence, was prosecuted, on the same facts, for a greater offence.

(The Constitution of the United States provides, that no person shall be twice put in jeopardy, of life or limb, for the same offence. This is not, perhaps, applicable, as a constitutional principle, to offences against a State; yet, it is but the enunciation of a well established common law principle, and, as such, is expressly adopted by our statute of 1805. The term limb, in this part of our constitution and laws, is a typical expression for punishment, and offence, in the connection, means not the technical name of the crime, but a criminal act; and the principle is, that no man shall be punished twice for the same criminal act. The attempt of the State, to prosecute the accused a second time for the same criminal act, is clearly a violation of this principle.)

There is authority to this effect: In the case of *The State of Connecticut v. Shepherd*, the prisoner was prosecuted and convicted of an attempt to commit a rape. It appeared, on trial, that he had actually committed a rape, and it was urged by his counsel, in support of an application for a new trial, that he should not have been convicted of the attempt, as the lesser was merged in the greater crime. The new trial was refused, Judge Daggett, a distinguished jurist, laying down as the basis of the opinion, in which the Supreme Court concurred, that a conviction or acquittal, in a prosecution for an attempt to commit a rape, would be a bar to a prosecution for the rape, (and said that it was repugnant to the well settled principles of law, that a prisoner should be tried twice for the same facts.)

An acquittal of a servant, charged with murder in killing his master, at common law, bars a prosecution for petit treason for the same act. 2 Hale's Pleas of the Crown, 246.

A conviction of manslaughter, is a good plea against a prosecution for murder, (4 Coke's Rep., 466,) because, says Coke, the prisoner cannot be tried again for the same death.

It is evident, the district attorney tried the accused for an assault and battery, from an apprehension that he might not be able to convict him of the maiming, on account of the difficulty of showing the malice essential, by the statute, to constitute the last offence. We think he might have accomplished his object, by

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insisting in the prosecution for the maiming; that if the the jury were unable to find the malice, they should convict for the assault and battery, necessarily implied in the greater charge. Even if the prisoner was actuated by the malice supposed, it is better he should escape punishment, than to violate principles which have a strong hold upon the affections of a humane and free people.

The judgment of the district court is affirmed, with costs.

### A. R. KNOX v. JOHN BUHLER.

Where notice of protest is sent to a post office, in the parish in which the endorser lives, in the absence of proof of a nearer post office, the notice will be deemed sufficient.

**A**PPEAL from the District Court of West Baton Rouge, *Burk, J. J. M. Elam*, for plaintiff. *G. S. Lacey*, for defendant. The judgment of the court (*Slidell, J.*, absent,) was pronounced by

*EUSTIS, C. J.* This appeal is taken by the defendant, from a judgment rendered against him on the endorsement of a promissory note.

The only point which we deem it material to notice, is one presented by the counsel for the defendant, relating to notice of the protest of the note. It is urged, that it was incumbent on the plaintiff to show, that the post office to which the notice was directed, was the office at which the defendant was accustomed to receive his letters, or the nearest one to his residence; and the case of the *Bank of Louisiana v. Carl*, was referred to as supporting this argument. The rule in that case does not apply to this. It is not shown, that there is any other post office near the defendant's residence. The address was to the defendant, at West Baton Rouge, Lobdell's post office. The residence of the defendant is in that parish, and in the absence of any evidence, as to any other post office, we consider the notice good.

The judgment of the district court is therefore affirmed, with costs.

### ZENON DEMORUELLE v. P. P. SUGG et al.

Dirt eating is not a disease, but merely the cause of a disease. It is not, therefore, necessarily a redhibitory vice, which should annul the sale of a slave.

**A**PPEAL from the District Court of Iberville, *Burk, J. Deblicux and Taylor*, for plaintiff. *Zenon Labauve*, for defendant. The judgment of the court (*Slidell, J.*, absent,) was pronounced by

*PRESTON, J.* The defendants, being sued for the amount of a promissory note, plead that the same, with two others, amounting in the aggregate to nine hundred and thirty dollars, were given for the price of a slave named *Elie*, purchased at the sale of the effects of *François Lebeau*, deceased; alleging that the consideration of the notes failed, because the slave was affected, at the time of the sale, with redhibitory diseases, to wit, the habit of dirt eating and the dropsy, of which he died. For which reason, they pray that the sale may be rescinded, and the three notes cancelled, with damages.



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The sale took place on the 18th of March, 1848, and the slave died on the 1st of July, 1849, more than fifteen months afterwards. In the meantime, he was not tendered back; no suit was brought to rescind the sale, nor does it appear that the plaintiff was ever notified of any complaint on account of the health of the slave. No physician was employed to attend on the slave until five months after the sale. Such facts, raise a strong presumption that the slave was not seriously affected with disease, at the time of the sale. The habit of dirt eating is not necessarily a redhibitory vice. It is the cause of disease, but not the disease itself.

The disease caused by the habit, is dropsy. The mind naturally inclines to the belief, that when this disease has become incurable, it would run its course in less than fifteen months, and would exhibit symptoms, which required medical aid, in less than five months after arriving at the incurable stage.

The evidence in the case strongly confirms these impressions. *Dr. Mann*, a physician of forty years' standing, says that the state and condition of the health of the slave was good; that, at the time of the sale, he was sound in health and body; that he was not affected with the dropsy, and does not know that he ever ate dirt; that he formed his opinion of the health of the slave by the frequent opportunities he had to see him, being, for a long time previous to the sale, the physician of the plantation where he was, and the family physician of *Mr. Lebeau*, whose slaves he attended, and continued to attend, from his death until the time of the sale.

*Valerier Bergeron* knew the slave; saw him at the time of the sale, and he appeared in good health. He considered him one of the best working hands on the plantation of the late *Mr. Lebeau*.

Four other witnesses, living close to the plantation, knew the slave well; knew nothing of his being addicted to dirt eating, and to them he appeared healthy.

In opposition to this testimony, the defendants offer that of *Dr. Hornsby*, who saw the slave about a month after the sale, and *Dr. Garrett*, who was called to attend him professionally about five months after the sale. They express the opinion that he must have been in the habit of eating dirt for years; that he had the dropsy, of which disease he died, in July, 1849. The first thinks the disease could not have developed itself in a month, to the extent which was exhibited when he saw the slave; that he had an approaching dropsy of the feet, which is an advanced stage of the disease. It seems strange, then, that he should have lived fourteen months afterwards.

The other physician attended the slave a month or six weeks, in August or September, 1848, and is of opinion, that the disease was in an advanced stage then, but could not tell how long it had existed before. He, like *Dr. Hornsby*, considered him incurable, and sent him back to his master; and yet he lived nine or ten months afterwards. On this, as well as on the occasion of the examination by *Dr. Hornsby*, it would have been much more satisfactory, if the defendants had tendered back the slave, and afforded the plaintiff the chance of saving his life, by care and medical skill.

The note was given for value received, and raises a presumption against the defendants, since they could have had an examination contradictorily with the plaintiff, and settled the difficulty before giving it. Though defendants in the case, they are plaintiffs in the redhibitory claim, and, as such, it was incumbent on them to produce, by evidence, reasonable certainty that the disease existed to such a degree as rendered the slave useless at the time of the sale. C. C.

**DEMORUELLE** 2496, 2508. They have offered nothing but the opinions of physicians, formed  
**v.** by an inspection a length of time subsequent to the sale. We have frequently  
**Succ.** had occasion to express our opinion of the unsatisfactory character of such testimony, not from a doubt of the opinion, but from the intrinsic nature of the evidence. This case is remarkably similar as to the disease and its cause, and all the details, to that of *The Executors of Dupré v. Desmaret*, in which we were obliged to set aside the verdict of a jury. 5th Ann 591. See also the case, *Seaton v. Municipality Number Two*. 3d Ann. 44. Also, 5th Ann. 592.

Reluctant as we are to reverse a judgment on a question of fact, we are compelled to say, that the evidence in this case, clearly preponderates in favor of the plaintiff.

The judgment of the district court is reversed; and it is decreed, that the plaintiff recover from the defendants *in solido*, the sum of three hundred and ten dollars, with eight per cent interest, from the 4th day of April, 1849, until paid, and costs in both courts.

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### HONORE LEONARD v. JOSEPH KLEINPETRE et. al.

The plaintiff brought an action for the removal of obstructions to the natural drainage which the defendant has made, and also for damages. *Held*: That the plaintiff, after dismissing his claim for damages, still had the right to insist upon a judgment for the removal of the obstructions.

**A** PPEAL from the District Court of Iberville, *Burk, J. W. E. Edwards*, for plaintiff. *H. F. Deblicu*, for defendants. The judgment of the court (*Slidell, J.*, absent.) was pronounced by

**ROST, J.** This is a suit for the removal of levees and embankments erected by the defendants, on their land, which it is alleged obstruct the natural flow of the waters falling upon or passing through the land of the plaintiff. The petition contains also a claim for damages.

The defendants having failed to answer, the plaintiff took a judgment by default, and there being no jury in attendance at the time, he waived the damages, in order to try his case, and adduced evidence in support of his allegations, after having dismissed the suit as to *Nerault*, one of the defendants.

The district judge dismissed the petition on the ground that this was purely an action of damages, and that as the damages had been waived, there was nothing before the court. The plaintiff has appealed, and the defendants have appeared in this court.

The judgment is manifestly wrong; the prayer for the removal of the obstructions, is as distinct as language can make it, and the testimony clearly establishes that the defendants have erected, on their upper line, (which is the lower line of the plaintiff,) a levee which completely closes his natural drains and renders his land unfit for cultivation.

As the case is before us, he is entitled to have those drains opened. If it be true, that the defendants had a good defence to make, they should have appeared and made it. We are not called upon to take better care of them, than they choose to take of themselves.

It is ordered, that the judgment in this case be reversed. It is further ordered, that the defendants be directed to remove the obstruction which arrests the natural flow of the waters, falling upon or passing through the land of the plaintiff, described in the petition, and to restore his natural drains to their original depth. It is further ordered, that a *writ of distringas* issue, if necessary to enforce this decree, and that the costs in both courts, except those made against the defendant, *Nerault*, be paid by the defendants; the excepted costs to be paid by the plaintiff.

LEONARD  
v.  
KLEINPETRE.

### SUCCESSION OF SAMUEL MARTIN.

Where a wife has obtained judgment against her husband for having sold slaves belonging to her, and having converted the proceeds of the sale to his own use, her property in the slaves must be considered as merged in the judgment.

**A** PPEAL from the District Court of Ascension, *Duffel, J. Mrs. Martin* intermarried with her deceased husband, in the year 1823. The slave *Else* was given to her by her father. In 1846, *Martin*, her husband, having parted with the possession of the negroes, and representing that he had sold them, his wife instituted a suit against him, and claimed a judgment for their value, which she obtained to the amount of \$1,600, with a mortgage from the time when it was supposed they had been sold. This judgment was executed, as far as the means of her husband would then allow, by a sale of property, which brought \$700; bid in by *Mrs. Martin*, and sold, subject to *St. Pé's* judicial mortgage previously registered. Sale made in 1847. In 1848, *Martin* died, and the negroes, *Else* and children, were found in his succession, were sold and purchased by *Mrs. Martin*.

*A. M. Dunn*, for appellant. *Deblicu and Taylor*, for appellee. The judgment of the court (*Slidell, J.*, absent,) was pronounced by

*EUSTIS, C. J.* The appellant, who is the widow of the deceased, asks for a reversal of a judgment for the homologation of a tableau of distribution of the effects of her husband's succession, and a decree in her favor, allowing to her the proceeds of the slave *Else* and her children, which had been adjudicated to *St. Pé*, a mortgage creditor, by virtue of a judicial mortgage.

It appears, that she had previously obtained a judgment against her husband for the value of these slaves, which, it was alleged, the husband had sold, and had converted the proceeds of the sale, \$1,500, to his own benefit. This judgment was partially satisfied, under an execution, against the husband. Her property in the slaves, must be considered as merged in the judgment thus obtained.

The judgment of *St. Pé*, is older than her judgment. It was recorded on the 25th October, 1840, and was reinscribed in September, 1850. It takes precedence of it as a privilege on the property of the succession, according to the evidence before us. By her judgment, her tacit mortgage relates back to January, 1846, only.

The judgment of the district court is therefore affirmed, with costs.

## RICHARD TERRELL et al. v. JAMES J. ALLEN.

The father held certain slaves under a deed of trust executed in Mississippi, binding him to hold them for the use and benefit of a son and daughter, and upon the majority or marriage of the children, to execute a conveyance to them. He removed to Louisiana, and by some means, parted with the possession of the slaves. They were subsequently transferred several times; suit was instituted by one of the children, and the heirs of the other, for the slaves, against the person who, at the time, had them in possession. The defendant and his warrantor, proved more than ten years' possession in good faith, and under a just title. *Held*: The legal title to the slaves was vested in the father by the deed of trust. When brought by him to this State, they became subject to our laws, which recognize no such right of property as that claimed by the plaintiffs.

**A**PPEAL from the District Court of Lafourche, *Randall, J. C. A. Johnson*, for plaintiffs. *J. C. and A. B. Beatty*, for defendant. *Winchester Hall*, for warrantor. The judgment of the court (*Slidell, J.*, absent,) was pronounced by

**EUSTIS, C. J.** This appeal is taken by the plaintiffs from a judgment rendered against them in favor of the defendant, in the court of the fifth district. The plaintiffs brought their action for the recovery of the slave *China*, and her issue, together with her wages for a series of years. *Richard Terrell* claims one undivided half interest in the slaves, in his own right; the other plaintiffs claim in the right of *Louisa Terrell*, deceased. *Richard Terrell* and *Louisa Terrell* were children of *Richard Terrell*. Their father, it seems, held the slave *China*, and certain other slaves, under a deed of trust, as it is called, executed in Adams county, in the State of Mississippi, on the 24th of March, 1822, where *Terrell* and his wife resided. They afterwards removed to this State with their household and slaves, and resided in New Orleans. The deed purported to sell and convey, for and in consideration of the sum of twenty-two hundred dollars, paid in hand, eight certain slaves, of whom the said *China* was one, to *Richard Terrell*, with a covenant on his part, that he is to hold the slaves for the use and benefit of his, the said *Terrell's* daughter and son, *Louisa* and *Richard*, until they shall become of lawful age or be married: that is, until either should be of age, or the said *Louisa* should be married; in which event, the said *Terrell* binds himself to make to each, a full title to one undivided half interest on the slaves. In the event of the death of either, before their majority or marriage, the right to the slaves was to vest in *Richard Terrell*.

The slave *China*, it appears, was sold at sheriff's sale in the parish of Lafourche Interior, on the 18th of April, 1831, under an execution issued on the judgment in favor of *James Porter v. Stephen and Rezin Bowie*, and *Alexander Thomasson* became the purchaser, for the sum of six hundred dollars. *Thomasson* sold her to *James A. Scudday*, and *Scudday* sold her to the defendant, *Allen*.

We find nothing in the evidence, impugning the good faith of the defendant or his vendors, in relation to the title of the slave, and we consider the possession in them to have been uninterrupted from the date of the sheriff's sale, April 18, 1831. It does not appear that *Terrell*, the father, ever made any title for the slaves to either of his children, and so far as any right by inheritance from

him is relied upon, it is obvious that his claim to the slaves were extinguished by the prescription of five years during his life time. Art. 3444, C. C.

The legal title to the slaves was vested in *Richard Terrell* by the deed of trust. He brought them to this State, and they became subject to our laws, which recognize no such right of property as that claimed by the plaintiffs. Our views on this subject are fully expressed in the case of *Harper v. Stanbrough*, 2d Ann. 380. We have constantly before us the danger of deviating from the principles established in that case, and of introducing modifications of the right of property, established by a system of jurisprudence, to which our code is directly opposed.

The judgment of the district court is therefore affirmed, with costs.

TERRELL  
v.  
ALLEN.

### THE STATE v. HARMAN B. BENJAMIN.

An indictment, couched in the very terms of the statute, charging that the accused did inveigle, steal and carry away a slave, so that the owner was deprived of her services, necessarily implies that the acts were criminal; and it is not essential that it should charge that the acts were done feloniously, maliciously or unlawfully.

Where it does not appear from the record that the accused, before trial, was served with a list of the jury, it will be presumed he was served, or waived his right, unless there be evidence that he objected to going to trial upon that ground.

**A** PPEAL from the District Court of Pointe Coupée, *Farrar, J. C. Ratliff* and *J. R. Grymes*, for appellant. The judgment of the court (*Slidell, J.*, absent,) was pronounced by

**PRESTON, J.** The defendant is indicted for inveigling, stealing and carrying away a slave, named *Maria*, the property of *Mrs. Hamilton*, so that the owner was deprived of the use and benefit of her services. There is a further count, for aiding the slave in running away from the service of her mistress. It is charged, that the acts were done at the parish of West Feliciana, on the 4th of July, 1849. The accused was tried in the parish of Pointe Coupée, having obtained a change of venue, was found guilty, sentenced to two years' imprisonment in the penitentiary, and has appealed.

His counsel contends, that the indictment is insufficient, because it is not charged that the acts were done feloniously, or maliciously, or unlawfully, or with any qualification showing that they were criminal.

The indictment is couched in the very terms of the statute, that the accused did inveigle, steal and carry away the slave, so that the owner was deprived of her services. These terms imply, that the acts were criminal. The last count is, for aiding the slave to run away from her mistress, so that the owner was deprived of her services. This describes, as clearly as possible, an act made unlawful by statute, and is equal to an express charge, that the act was unlawful. The case is different from that of *The State v. Reed*, where the words uttered by the accused might have been perfectly innocent; and there was no charge that the uttering of them was unlawful, wicked, malicious or felonious, nor any circumstances stated in the indictment which necessarily gave the words such a character. 6th Ann. 228.

The opinion of the court, in the case of *The State v. Ritchie*, prosecuted for the offence now under consideration, seems to indicate, that if the special ver-

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|-----|------|
| 7   | 47   |
| 44  | 322  |
| 44  | 1118 |
| 7   | 47   |
| 45  | 650  |
| 7   | 47   |
| 47  | 1500 |
| 7   | 47   |
| 48  | 277  |
| 48  | 306  |
| 7   | 47   |
| 111 | 957  |

STATE  
v.  
BENJAMIN.

dict had been in the words of the statute, without any qualification, it would have been sufficient; and if so, an indictment containing the words of the statute is sufficient to support a judgment, on a general verdict.

It is assumed, in a bill of exceptions, also in a charge to the jury required from the court, and in an application for a new trial, that the slave ran away from her mistress, in Pointe Coupée, in July, 1849, and was arrested in the quarter of the accused, in February, 1850. It is contended by his counsel, in support of the bill of exceptions, charge applied for, and application for new trial, that proof of the slave's arrest in the defendant's quarter, or that he harbored her, tends to establish another and distinct statutory offence, subject to a different punishment, and not to establish the crime charged against the accused. It undoubtedly tends to establish the offence of harboring the slave, but it by no means follows, that it does not equally tend to prove, inveigling and stealing the slave, and aiding her to run away. The same evidence that tends to prove one crime, often tends to prove another. The firing a gun may tend to prove an attempt to kill, or manslaughter, by an actual killing; so the felonious taking of goods may be offered to prove a burglary as well as larceny.

The evidence offered was admissible, and the court properly refused to charge the jury, that it did not tend to support the charge of inveigling and stealing, and aiding the slave to run away. The fact, that she was in defendant's quarter, the same day that he purchased her, as a runaway, raised a strong presumption of those charges, as the possession of property recently stolen, raises a presumption, that the possessor is the thief, until the possession is otherwise explained.

And certainly, in this case, the judge, at the request of the counsel of the accused, guarded his charge sufficiently against any unreasonable effect of the presumption. For he instructed the jury, that the facts and circumstances proved, should be consistent with the hypothesis of the guilt of the accused; that they should not only be conclusive of his guilt, but actually exclude every other hypothesis except those affirmed by the prosecuting attorney; and that if they entertained a reasonable doubt, that the accused committed the offence charged in the indictment, in the manner and form charged, they were bound to acquit him.

It is urged, that there is error in the proceedings, because they do not show that a list of the jury, which was to pass upon his trial, was served upon the prisoner two days before the trial. An order of court was made, directing it. We find no objection made to going to trial; none by way of challenge; no application for a new trial, or motion in arrest of judgment on this ground; and are bound to presume, therefore, that the list was served upon the prisoner, or that he waived that formality, and was content with the jury that tried him. In this respect, the case is entirely different from that of *The State v. Howell*, in which the objection was made when the prisoner was put upon trial. There must be an essential defect in the prosecution, and which could not be waived in the district court, to induce this court to notice it, where the district court did not pass upon it, because no objection was made at the proper time and place.

When the case was called for trial, the accused asked for an attachment against one of his witnesses, *Mrs. Lyons*. It was shown, that she was so far advanced in pregnancy as to be unable to attend court. The attachment was properly refused, and the only relief of the prisoner was to obtain a continu-

ance of the cause, for which he did not ask, and therefore is entitled to no relief on this account.

STATE  
v.  
BENJAMIN.

In the progress of the trial, the following question was propounded by the counsel of the prisoner, in cross-examination, to *Mr. and Mrs. Hamilton*, witnesses on behalf of the State: "Were you, or were you not, informed by a gentleman residing in Pointe Coupée, as testified by you in your testimony in chief, he had caught the said slave in the parish of Pointe Coupée, and that she had escaped from his custody before he could convey her to you?"

The question was objected to by the district attorney, and rejected by the court, on the ground that the answer would only furnish hearsay evidence.

It is true, as argued by the defendant's counsel, that the fact to be elicited by a categorical answer to the question, that a person did give such information, was original evidence; but the information itself, was hearsay evidence. The information was objectionable on this ground, and the original evidence immaterial to the issue. The mere fact, that a person made the statement supposed in the question, had no tendency to disprove the charge that the accused inveigled or stole this slave in West Feliciana, or aided her in running away.

In cross-examination, much latitude is always allowed. For the good order and dispatch of public business, it must be limited by the discretion of the judge. Much must be left to that discretion, to govern which, no precise rule can be laid down. Greenleaf on Evidence, 3449.

We think it would save time and trouble, and perhaps be more satisfactory to the court, jury and parties, to permit such immaterial statements, having some connection with the matter in issue, to be made when desired by a prisoner, if not inconsistent with the time and order of the court. The judge could always, in his charge, separate the legal and material testimony from the irrelevant, without infringing on the exclusive province of the jury to consider the material facts; and the Constitution and laws, in confiding trials involving life, liberty and property to juries, presupposes capacity to make the distinction, when pointed out to them by the court, and integrity to render their verdict according to law, and on legal evidence. But we cannot say that the discretion of the court was improperly exercised in this case, or the rules of evidence violated.

There are other matters pressed upon this court, in support of the application of the accused for a new trial, which was refused by the district court. They fall within the rulling of this court in the cases of *The State v. Hunt, Bret et al.*, that we had no constitutional power to afford relief.

The judgment of the district court is affirmed, with costs.

### CONSOLIDATED BANK v. NOLAN STEWART.

The fact that the certificate of a notice of protest follows immediately the protest, so as to appear to be a part of the same instrument, does not invalidate the certificate.

**A** PPEAL from the District Court of West Baton Rouge, *Burk, J. C. A. Johnson*, for plaintiff. *J. M. Elam*, for defendant. The judgment of the court (*Rost, J.*, having declined sitting in the case,) was pronounced by

CONSOLIDATED  
BANK.  
v.  
STEWART.

SLIDELL, J. The defendant resists the payment of two promissory notes, endorsed by the testator, upon the alleged ground of want of legal notice of protest. There was judgment against him, and he has appealed. 'A certified copy of the protest and of the certificate of notice were offered in evidence. The certificate appears to be a continuation of the act of protest, and to have been made in conformity with the act of 1847, which authorizes notaries, in their protests of bills of exchange and promissory notes, to make mention of the demand made upon the drawer, &c.; and of the manner and circumstances of such demand, "and by certificates added to such protest, to state the manner in which any notices of protest to drawers, endorsers, or other persons interested, were served or forwarded; and whenever they shall have so done, a certified copy of such protest and certificate shall be evidence of all the matters therein stated." The copy of the protest and the copy of the notice, seems to be given by the notary upon one sheet, as far as we are enabled to judge from the transcript. The certificate thus following the protest, (which embodies a copy of the note,) is in these words: "and again, on the same day of same month, notice of this protest was given to the endorser on said note, by three separate letters to that purpose, addressed to him at 'Baton Rouge,' 'West Baton Rouge,' and 'East Baton Rouge,' and delivered by me, notary, at the post office in this city." It is signed by the same notary and witnesses who sign the protest. Thus, as is correctly argued by the appellee, the protest and certificate appears to be part of a continuous record, having one date, which is set forth in the opening of the instrument.

The time mentioned in the certificate may be fairly interpreted as applying both to the writing and mailing, which are spoken of conjunctively. The certificate in this case differs from the certificate in *Menard v. Winthrop*, 2d Ann. 333, which was without a specific date, and was not connected, as in this case, with the antecedent annunciation of the protest.

Judgment affirmed, with costs.

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### MILES A. MCLEOD v. FROST and SPRINGER et al.

Where an agent has purchased property for his principal, which has been seized by a creditor of the agent as his own property, in a contest between the principal and the seizing creditor, the agent is a competent witness to prove his agency, and that the property belongs to the principal.

**A**PPEAL from the District Court of Lafourche, *Randall, J. Winchester Hall*, for plaintiff. *J. C. and A. Beatty*, for defendants. The judgment of the court was pronounced by

SLIDELL, J. This is an action for the recovery of a horse, of which the plaintiff alleges himself to be the owner, and which had been seized on an execution against *Jordan*.

It appears, that on the 16th December, 1850, *Jordan* bought the horse at Donaldsonville, for, and by the directions of *McLeod*; took a receipt for the price, \$265, in *McLeod's* name, and brought the horse to Thibodeauxville, in the parish of Lafourche, where the plaintiff lives, the next day being the day preceding the seizure. Before the seizure was made, *Jordan* stated, in the presence of the seizing creditor and others, at the livery stable where the



horse was put up, that the horse belonged to *McLeod*. *McLeod* had advanced one hundred and sixty-five dollars, and the residue *Jordan* paid out of money belonging to his wife, who was indebted to *McLeod*.

McLeod  
v.  
Frost.

A portion of the evidence going to show that the horse was bought for, and by the direction of the plaintiff, is undisputed on the score of competency. But it is said, one of the witnesses, *Jordan*, was incompetent, on the ground of interest as a witness for the plaintiff, to prove the purchase for his account, by his authority and with his funds. We think the witness was properly admitted. His agency to purchase the horse at the price given was established *aliunde*; and he was safely admitted to prove, that he acted according to the directions of his principal, and within the scope of his duty. An agent is admissible in such case, on the ground of necessity, and from considerations of public convenience; and moreover, his principal can never maintain an action against him for any act done according to his own directions, whatever may be the result of the suit in which he is called as a witness. See *Greenleaf*, 417.

It would seem that *Jordan* is embarrassed, as here was an execution out against him; but we see no fair ground to suspect, that the plaintiff let *Jordan* use his name for the purpose of protecting *Jordan's* property, nor is he presented in the attitude of a party who has stood by, and let his property remain in the possession and control of another, under circumstances which might reasonably mislead the public.

Judgment affirmed, with costs.

### MARCELIN MAJOR et al. v. VIRGINIE ESNEAULT.

A mere defect of hearing, or of sight, does not render a person incompetent to be a witness to a nuncupative will.

There is neither a substitution, nor *fidei commissum*, in a will to the following effect: "In consequence of the affection I bear to my grand niece, A., a child whom I have brought up, and who has always taken care of me, I give and bequeath the whole of my property, after my debts are paid, willing that, at my decease, my executor shall put the said legatee in possession of my land and slaves; that the whole shall be administered and preserved in kind by my executor, for the best interests of the said legatee, until she shall have attained the age of majority, or have married." The evidence showing, that the legatee was of age when the testatrix died.

**A**PPEAL from the District Court of Pointe Coupée, *Farrar, J. Provosty*, for plaintiffs. *Lacoste* and *T. J. Cooley*, for defendant. The judgment of the court was pronounced by

**EUSTIS, C. J.** The plaintiffs, who are the heirs at law of *Mrs. Simon Porche*, late of the parish of Pointe Coupée, instituted the present suit for the purpose of annulling her last will and testament. The testatrix died in December, 1850. The will bears date the 23d of October, 1846. It is in the nuncupative form, by public act; was made at the domicile of the testatrix, in the parish of Pointe Coupée, and is signed by her, by the notary, and by three witnesses. The case was tried before a jury, who rendered a verdict for the defendant; and from the judgment on the verdict the plaintiffs have appealed.

The grounds for the nullity of the testament, relating to matters of form, as presented by counsel, are, that the instrument was not dictated by the testatrix and written by the notary, in the presence of the witnesses, and that one of the

MAJOR  
v.  
ESNEAULT.

witnesses to the will was deaf. All the formalities required by law for the validity of this class of wills, appear, on the face of this instrument, to have been complied with. The case was tried in September, 1851, nearly five years after the making of the will. The plaintiffs introduced, as witnesses on the trial, the three witnesses to the will, *Favre*, *Monceret* and *Boiteux*. The two first, *Favre* and *Monceret*, prove a compliance with the forms required by the article 1571 of the Code. The testimony of *Boiteux* does not support that of the other witnesses, as to the dictation of the testatrix and the writing of the will in their presence. But there would be no propriety in permitting his testimony to outweigh and contradict that of the two other witnesses offered by the plaintiffs themselves. Giving no more than its due weight to the act of a public officer; considering that the dissenting witness signed the act, in which he bore witness that the formalities had been complied with, which his testimony now tends to falsify; and bearing in mind the uncertainty attending the precise recollection of facts occurring at so distant a period, we are bound to hold this part of the plaintiffs' case as not proved.

The counsel for the plaintiffs has urged, that a person too deaf to hear the testatrix dictate her will, is not a competent witness to it, according to the article 1584 of the Code. This article declares persons insane, deaf, dumb, or blind, are absolutely incapable of being witnesses to testaments. We do not think that the witness, *Favre*, can be considered as laboring under this incapacity, at the time of his being a witness to this will. We think, the contrary results from his testimony.

It is impossible to extend this article, which establishes an absolute incapacity of being witnesses to last wills, to persons whose sense of hearing or seeing is merely defective. The incapacity is based upon the physical impossibility of the deaf, the blind, the dumb and the insane, fulfilling the duties of witnesses. The law does not exclude from being witnesses to wills, those whose organs of sight or hearing are not perfect; and an infirmity of a witness, in this respect, can only be considered as operating upon the effect of his testimony. The partial deafness of the witness, *Favre*, appears to have been disclosed on his cross-examination. He was offered as a witness by the plaintiffs. No allegation of the deafness or incompetency of the witness was made in the petition, as a substantive ground for annulling the will and taking his testimony together; and, making allowance for the manner in which the testimony of witnesses is reduced to writing by the clerk on the trial, we think it proves a compliance with the requisites of the law, in the making of the will.

Such being our conclusions, after an attentive examination of the evidence adduced by the plaintiffs, against the formalities of the will, it is unnecessary to consider that offered by the defendant.

Other grounds are alleged, on which the nullity of the will is asserted. It is said that the will is null, because the clause by which the executor was directed to keep in his hands, all the property bequeathed to the universal legatee, and to preserve the same for her until she became of age, constitutes a *fiduci commissum*, and is prohibited by law. The clause of the will is to this effect: "In consequence of the affection I bear to my grand neice, *Victorie Virginie Esneault*, daughter of the late *Louis Esneault*, and his wife, *Aspasie Major*, a child whom I have brought up, and who has always taken care of me, I give and bequeath to her, the whole of my property, (my debts being first paid, and the legacies made by me being satisfied,) willing hereby, that at my decease, my executor shall put the said legatee in possession of my land and slaves; that the whole shall be

administered and preserved in kind by my executor, for the best interests of the said *Victorie Virginie Esneault*, until she shall have attained the age of majority, or have married."

MAJOR  
v.  
ESNEAULT.

*Gosseraud*, the executor named in the will, died two years before the testatrix. This clause creates neither a substitution nor a *fidei commissum*. The property is given to the legatee absolutely, and she is to be put in possession. There is no disposition in favor of one person, of property to be preserved and to be returned to another. There is no right of property established in the executor. *Miss Esneault*, the legatee, was born in December, 1827. She was eighteen years of age in 1846, when the will was made, and was of age when the testatrix died. There is nothing illegal in a testamentary disposition of this kind. The other testamentary dispositions present no ground whatever for the plaintiffs' action. The testatrix gave to the mother of the universal legatee, the usufruct of two arpents of land front, with the buildings, &c.; she gave their liberty to certain slaves, and the usufruct of three arpents part of land to a free woman of color. The plaintiffs have no interest in contesting the validity of those legacies, if they fail, they inure to the benefit of the universal legatee. *Prerost v. Martel*, 10 R. R., 513. C. C. 1697.

The judgment of the district court is therefore affirmed, with costs.

### EVERY BREED v. PURVIS, WOOD & Co.

One who has received a sum of money on deposit, cannot plead compensation against the depositor by a debt which did not arise from the deposit. C. C. 2927.

APPEAL from the Fourth District Court of New Orleans, *Strawbridge*, J. J. *Ad. Rozier*, for plaintiff. *Bonford* and *Finney*, for defendants. The judgment of the Court (*Eustis*, C. J., absent,) was pronounced by

ROSE, J. The plaintiff, *Avery Breed*, sues upon the following receipt: "New Orleans, 11th January, 1849. Received from *Dr. J. J. Henderson*, for *Avery Breed, Esq.*, one thousand and twenty-one dollars, which we hold subject to *Mr. Breed's* order." (Signed) PURVIS, WOOD & Co."

The defendants first plead the general issue. But on the day of the trial, they filed an amended answer, alleging that at the time the receipt bears date, *Breed* was a partner of the commercial firm of *Hand* and *Breed*, which firm is largely indebted to them, and that he is personally liable for the debts of the firm. They pray to be authorized to retain the sum claimed by way of offset. There was judgment against them, and they appealed.

It is urged in behalf of the appellants, that the deposit made by *Henderson* in this case, was what is termed in law, an irregular deposit; that under art. 2934, C. C., such deposits produce no legal effects, and that article 2927, which prohibits the retention of things deposited, by way of offset, exclusively applies to cases in which a real deposit is shown. This view is inconsistent with the theory of compensation under the civil law: compensation was there considered as an equitable remedy, and never took place where it would have been against good conscience. *Pardessus Droit Commercial*, vol. 2, No. 325. *Merlin Rep. verbo Compensation*, parag. 2, No. 11. *Nolan v. Shaw*, 6th Ann. 46—Opinion of Mr. Justice Slidell.

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In conformity with this principle, under the laws of Rome, compensation never took place in cases of confidential contracts, and the maxim in *causa depositi compensationi locus non est*, was considered as applicable to deposits of all kinds. We take this to be the law here at the present day.

The articles of the code, which prohibit compensation in cases of deposit and of loan for use, are instances of the general rule, and not the rule itself. Whatever may be the true meaning of article 2934, it is undeniable, that irregular deposits are made every day, and that however irregular they may be, they are still confidential contracts, which the depository cannot be dispensed from executing without a breach of good faith. This was clearly the view taken by the defendants, down to the very day of the trial. *Hand* wrote to them that he would try to get *Breed* to authorize them to credit the firm with the amount of the deposit. But it seems *Breed* would not consent, and although the defendants pressed the firm so hard, that *Hand* remonstrated, saying that their complaints were mortifying to him, they kept, to the last, *Breed's* money distinct from the partnership transactions. The only reason that can exist, why it nowhere appears in their accounts, is that, in their own opinion, it would have been inequitable to appropriate it to themselves. Being still under that impression when this action was instituted, their only defence was a general denial. Their subsequent plea of compensation was an after-thought, and is untenable, as after-thoughts usually are in courts of justice.

It is ordered, that the judgment in this case be affirmed, with costs.

### DICKSON & Co. v. B. K. SHARRETTS & Co. et al.

The testimony of a single witness is not sufficient alone, to establish a contract of guaranteeing the payment of the price of goods purchased, for an amount exceeding five hundred dollars.

**A**PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Gould* and *Howard*, for plaintiffs. *C. A. Jones*, for defendants. The judgment of the court (*Eustis, C. J.*, absent,) was pronounced by

PRESTON, J. This suit is instituted against *B. K. Sharretts & Co.*, on a promissory note, and *Plincy E. Davis* as having guaranteed the payment for merchandise, for which the note was given. The note is signed by *B. K. Sharretts & Co.*, and passing through various endorsements, is now sued upon by the original parties. *B. K. Sharretts & Co.* confessed judgment; *Davis* plead a general denial

*Franklin Roberts* was the agent of the plaintiffs in selling the goods, and he is the only witness to charge the defendant, *Davis*, with having guaranteed the payment of their price. He states, that *Sharretts & Co.* applied for the purchase of the goods, but that he declined selling to them without further information; that in a day or two, *Davis* called upon him, and stated that they were perfectly good; and asked the witness if he considered him good, to which the witness replied, that he considered him perfectly good; that *Davis* then said, if you consider me good, consider the sale as made to me; that *Sharretts* afterwards called upon him, and purchased twelve hundred dollars worth of goods, for which he paid five hundred dollars cash, and gave his note at six months for the balance. The witness testifies that he made the sale on credit, because he considered he was making the sale to *Davis*.

The evidence leads to the conclusion, that the sale was made to *Sharretts & Co.* The goods were applied for by them; were delivered to them; the cash payment made by them, and the note for the balance was given by them. They are now sued for the amount of their note, or balance of the purchase. They had a store, as is proved, and purchased other goods from the plaintiffs in the course of the season. *Davis* had no store; the goods were not delivered to him. There is no proof that he knew the amount of the sales; he made no payment on the goods; did not sign the note; and had no other transaction with the plaintiffs. There is no proof that he was interested with *Sharretts & Co.* as a partner, or in the goods, in any other manner. He can be charged, therefore, only as having, by contract, guaranteed the payment of the price of the goods, or rendered himself liable by giving credit to the purchasers. The contract to guarantee the price of the goods is only proved by a single witness. The sum claimed exceeds five hundred dollars. To render the defendant liable, the testimony of the witness should be supported by corroborating circumstances. C. C. art. 2257.

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We are unable to find in the record any corroborating circumstances, which are not proved exclusively by the same witness; and those stated by him are so light, as to give no weight to his direct testimony. A single other fact, remotely corroborates the testimony. It is, that *Davis* was security for the rent of the store. But, when we consider that no amount of goods to be purchased, was fixed at the interview of the witness with *Davis*; that he does not appear to have communicated the amount to *Davis* afterwards, or that a note payable at six months had been taken for the credit part of the purchase; that the witness did not apply to *Davis* to draw or endorse the note; that though negotiated, the credit of *Davis* was not given to it, and though sent to Philadelphia to the plaintiffs, no notice appears to have been given; that the drawers being doubtful, *Davis* guaranteed the price of the goods; that though the note was due in January, 1849, no application appears to have been made to *Davis* for more than a year afterwards. We consider the circumstances alluded to, as a corroboration of the testimony of the witness, too feeble to satisfy the law.

The judgment is reversed, and judgment of nonsuit rendered against the plaintiffs, who are condemned to pay costs in both courts.

### MILLS JUDSON v. J. L. LEWIS, Sheriff, et al.

A sale will not defeat an attachment which is levied before delivery.

To constitute a valid delivery, the consent of the seller must be made to appear. The mere taking possession of the thing sold by the purchaser, without the consent of the seller, does not amount to a delivery.

The plaintiff brought suit against the sheriff for a trespass, in levying certain attachments against a third person, upon his property. The sheriff called the attaching creditors in warranty. The plaintiff had purchased the property of the debtor. *Held*: That, as the attachments were levied before the delivery of the property to the plaintiff, he had no right to obstruct, or embarrass, the process of the court against the debtor.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Hoffman and Ogden, and Benjamin and Micou*, for plaintiff. *J. R. Grymes, J. B. Bemiss, T. L. Bayne, and M. M. Cohen*, for defendants. The judgment of the court (*Eustis, C. J.*, absent,) was pronounced by

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ROST, J. The plaintiff sued the sheriff of the parish of Orleans as a trespasser, for having seized, under writs of attachment against *John S. Caldwell*, an absconding debtor, movable property, which he claims under an authentic act of sale from *Caldwell*, and delivery before the seizure. On the call of the defendant, the plaintiffs in the attachment suits, made themselves parties to the record, and joined issue with *Mills Judson*. They subsequently entered into an agreement with him, that the property attached should be sold by the sheriff; the proceeds to be held by him, subject to the respective claims of the parties to the agreement, and without prejudice to their rights. The property was accordingly sold, and the plaintiff became the purchaser, at the price of \$5750, cash. The district judge appears to have considered, that the sale, under which *Judson* claims, was, in fact, an informal pledge, given to secure a loan of \$5000, upon which it is shown that six hundred dollars have been refunded; and being of opinion, that the attaching creditors had failed to make out their case, he gave judgment in favor of *Judson*, for \$4400, to be paid out of the proceeds of the property. The attaching creditors have appealed.

The agreement entered into between the plaintiff and the attaching creditors, and the sale under it of the property attached, amount to a waiver of the claim of damages against the sheriff. He is now a mere stakeholder; and the only question before us, is in relation to the distribution of the funds in his hands. We accede fully to the argument of the plaintiff's counsel, that the agreement is not to be considered as admitting the respective claims of the parties to it; and that the proof required of them is the same, as if no such agreement had been made.

Whatever be the nature of the plaintiff's title, it is incumbent upon him to establish, beyond all reasonable doubt, that he was in possession of the property under it when it was first attached; for, if he was not, after the attachment, the property was in the custody of the law, and could no longer have been delivered to him. The district judge considered the possession of the plaintiff most equivocal, and doubted whether it had preceded the first attachment. The circumstances under which the plaintiff pretends to have taken possession, after the vendor had absconded, are of so suspicious a character, that we cannot give to the testimony adduced by him, on this part of the case, greater weight than our learned brother gave it; and it would, perhaps, be sufficient to say, that the evidence of anterior possession is not such, as excludes all reasonable doubts of the reality of that fact.

But there is another difficulty in the way of the plaintiff, resulting from the nature of his contract with *Caldwell*, as ascertained by the evidence of his own witnesses, and the manner in which it has been partially executed. The plaintiff is a money dealer, and did not intend to become the keeper of a dram shop and ten-pin alley. The act of sale was required by him, under the belief, that it would secure a loan of \$5000, which he made to *Caldwell*, at a rate of interest, which is ignored. The sale bears date the 2d day of May, 1850. It is in proof, that after that date, *Caldwell* remained in possession, as before, until the beginning of June, when he absconded; and that, during that time, he was paying the plaintiff two hundred dollars a week on account. It is manifest, that a loan to be refunded, in this manner, excludes the idea that the possession was ever to be delivered to the creditor. *Caldwell* had no other means of refunding the loan, than those arising from the profits of the Phoenix House; and he could only realize those profits, by retaining the possession of the establishment. The intention of the parties is placed beyond all doubt, by the testimony of *Caldwell's*

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legal adviser. He states, that *Caldwell* remained in possession, as owner, up to the time of his departure; and that, before he went away, he left instructions to him, the witness, and to his clerk and agent, *Turnbull*, in relation to the administration of the property in the Phoenix House, during his absence. He said he was going to California, to get some money owing to him there, and would soon return; and he requested his attorney to keep off, if possible, his creditors, till his return; when he would pay them all. The plaintiff was one of those creditors, and his claim was the largest of any; so that, so far from *Turnbull* having authority to make the delivery to him, or to allow him to take possession, he was ordered to retain the possession himself, and positive instructions were given to the attorney to keep off the plaintiff and his claim, if possible.

The facts, in relation to the delivery, are as follows: After making three weekly payments, *Caldwell* absconded, without the knowledge, and to the great consternation of the plaintiff. On the next day, the plaintiff went to the Phoenix House, as an act of possession, and sent a notary there to make an inventory.

Article 2453, C. C., provides, that the tradition or delivery of movable effects, takes place either by their real tradition, or by the delivery of the keys of the building in which they are kept, or even by the bare consent of the parties, in certain specified cases. Here, there was no real tradition or delivery of keys by the vendor. Under the nature of his contract with the plaintiff, his consent cannot be presumed; and the evidence shows, most conclusively, that he never intended to make that delivery. We conclude, therefore, that no delivery has been shown.

The views of the district judge, in relation to the evidence, did not differ from our own; and he expressed the wish that he had it in his power to extend to the plaintiff, the rule applied in the case of *Nicholls v. Botte*, 6th Ann. 437. But he thought he was not authorized to do so, because the attaching creditors had omitted to prove their claims. We are unable to assent to this view of the law as it bears upon the present case. The ruling of the court would undoubtedly be correct, if the plaintiff had been in possession of the property when the attachments were levied upon it. But as he was not, he has no right to obstruct or embarrass the process of the court; and against him, the writ sufficiently justifies the seizure. The law of the case is laid down as follows, by Mr. Greenleaf: "If the plaintiff has never had possession of the goods, so that the sale, whatever it was, is incomplete for want of delivery, the proof of this fact, alone, will suffice to defeat the action against the sheriff, for taking the goods of the plaintiff. But if the transaction was completed in all the forms of law, and is assailable only on the ground of fraud, the sheriff must first entitle himself to impeach it, by showing, that he represents a private creditor of the debtor; and this is done, by any evidence which would establish this fact, in an action by the creditor against the debtor himself, with the additional proof of the process in the sheriff's hands, in favor of that creditor, under which the goods were seized." 2 Greenleaf Ev., 597. The appearance of the attaching creditors, on the call of warranty of the sheriff, does not change the legal aspect of the case.

We are of opinion, that the plaintiff has no claim upon the fund in the hands of the sheriff, and that it must remain subject to such judgments as the attaching creditors may obtain against *John S. Caldwell*, and be distributed among them according to their rank.

It is therefore ordered, that the judgment in this case be reversed. It is further ordered, that there be judgment against the plaintiff, on his claim upon

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the fund in the hands of the sheriff; and that said fund there remain for distribution among the attaching creditors, subject to the order of the Fourth District Court, from which the first writ of attachment issued. It is further ordered, that the plaintiff, *Mills Judson*, pay costs in both courts.

SLIDELL, J., dissenting. That *Judson* is a creditor for a large sum of money actually advanced to *Caldwell*, is established beyond dispute; and it seems to me just, that he should have the fund in court applied to his claim, unless the persons claiming as attaching creditors have shown a better right. They have omitted to shew such right.

If my brethren had thought it consistent with precedent, and in view of the peculiar circumstances of this litigation, to remand the whole cause, and so to give the defendants, by a new trial, an opportunity of remedying the oversight they have committed, I might have yielded to such a disposition of the cause. But I am unable to concur in the decree now made.

### LOPEZ & Co. v. THOMAS McADAM & Co.

When a party has been induced, by misinformation and a suppression of material facts, to take a joint interest in a shipment of merchandise to a foreign port, he is entitled to have the contract annulled, and to recover from the other party any sums he may have paid on account of the shipment.

**A** PPEAL from the Third District Court of New Orleans, *Kennedy, J. L. Castera*, for plaintiffs. *B. D. Howard*, for defendants. The judgment of the court was pronounced by

SLIDELL, J. The object of this action is, to have declared null and void a contract between the plaintiffs and the defendants, by which they took an interest with the defendants in a shipment of beef to London. The contract was embodied in the following memorandum: "Invoice of 188 tierces of prime mess beef, shipped on board the bark *Saone*, *Robertson*, master, consigned to *Messrs. Jones, Brothers*, London, on joint account of *Messrs. T. J. Lopez & Co.*, and *Thomas McAdam & Co.* New Orleans, December 26, 1848. 188 tierces of prime mess beef, at \$16, \$3008; drayage, 63 loads, at 50c., \$31 50—\$3039 50. Advanced on the purchase by *Thomas McAdam & Co.*, \$2,000—1,039 50. *Thomas McAdam & Co's* half is \$519 75; *T. J. Lopez & Co's* half is \$519 75. The profit on the half of the above transaction, *Thomas McAdam & Co.* will direct being paid to *Messrs. T. J. Lopez & Co's* friends in London or here, when account sales are received. (Signed) *THOMAS McADAM & Co.*"

At what date, whether on the 26th, 27th, or 28th December, this invoice was furnished to the plaintiffs, does not appear. On the 28th December, the plaintiffs paid the defendants \$519 75, and took the following receipt: "Received, New Orleans, 28th December, 1848, from *T. J. Lopez*, five hundred and nineteen dollars seventy-five cents, for one-half interest in the shipment of 188 tierces of prime mess beef, per *Saone*, to London, as per invoice rendered. (Signed) *THOMAS McADAM & Co.*"

The matter may have been, and probably was, the subject of previous negotiation; but we find no positive evidence of a final consent by plaintiffs to share the adventure prior to the 28th December. On the 27th December, 1848, the defendants addressed the following letter to *Jones, Brothers*: "New Orleans, 27th December, 1848. *Messrs. Jones, Brothers*, London. Dear Sirs: By



the bark *Saone*, Robertson, master, we have shipped you 188 tierces prime mess beef; 160 packed by *Thomas McCarthy* and *Peter Cuny*, and 28 by *J. S. Bates*. We purposed shipping more by this vessel, but found she was getting too deep; the cargo all being heavy. On this shipment you will please make insurance for £700.

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"We have drawn on you at sixty days sight for £500, which please honor. This bill was intended to cover a large shipment, which would have been made, had the vessel been capable of taking more; but by the *Russia*, now loading, we will send the balance, and such other as we can conveniently get. Any of the parties advancing here, will readily give fifty shillings per tierce, and until you raise your limits, you will not get much, unless we, as now, take the responsibility and risk, which is not pleasant often. Your obedient servants, (Signed) *THOMAS MCADAM & Co.*"

On the 26th of January, 1849, *Jones, Brothers*, addressed to *Lopez & Co.* and *McAdam & Co.* letters, advising them of their refusal to accept the draft of £500. upon the ground that *McAdam & Co.* had exceeded the limits for which they were authorized to draw, and also, in consequence of the receipt of the letter of *Lopez & Co.* on the one hand, and on the other, the silence of *McAdam & Co.* respecting the subject of that letter, which circumstances they properly characterized as extraordinary.

Upon the refusal of acceptance by the drawees, *Edward Morn*, of Liverpool, accepted for the honor of *James Robb & Co.*, to whom *McAdam & Co.* had negotiated the bill, together with the bill of lading. *Morn* had the beef sold and returned the account sales to *Robb & Co.* They exhibit a large loss on the transaction. There was a bill of exceptions to the admissibility of the account sales, which it is unnecessary to consider.

There is no binding contract without a valid consent to contract, and a consent induced by misrepresentation and *suppressio veri* with regard to a material subject matter of the contract, will not hold the party. He may demand a rescision. C. C. 1813, 1841, *et seq.*

In the present case, the defendants stated in the invoice furnished, that they had advanced on the purchase \$2,000. Taking the view of this expression most liberal to the defendants, and supposing it to mean that they had obtained an advance, as is common here upon European shipments, it was certainly a representation that they had not obtained an allowance for more than \$2000. But how did the matter stand when the agreement for joint account shipment was proposed, or at all events, at the time when the plaintiffs manifested their final assent to the contract, by paying their money? The defendants had actually negotiated a bill of exchange for £500, together with the bill of lading, and this, in contravention of their arrangement with the house who were the selected consignees of the joint account shipment; and they had also advised those consignees of the shipment, without making any mention of the plaintiffs' actual or expected interest, or any provision for placing their share of the surplus proceeds, if any, to the credit of the plaintiffs. Now the just and the mercantile inquiry in such a case, is this: would *Lopez & Co.* have assented to take an interest in the adventure, and have advanced their money, if they had known the true state of the case? This question cannot be answered affirmatively. All the probabilities are the other way. As prudent men, the plaintiffs would have foreseen what took place; the prompt refusal of the drawees to honor the draft. Again, they would also have seen, that in whatever hands the shipment might alternately go, its proceeds would have to be first applied to the

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reimbursement of the holder of the bill of the excess over the stipulated advance of \$2,000, which excess had gone into the pockets of the defendants, inconsistently with the understanding with the plaintiffs; and they would also have seen, that no provision had been made for putting their share of the capital and profits, if any, at their disposition in London.

We are therefore of opinion, that the plaintiffs must be considered as having consented to the joint adventure and advanced their money in error, induced by misrepresentation and suppression of material facts on the part of the defendants; and that, upon discovering the true state of the matter, they had a right to repudiate the transaction, and, by an action of rescision, recall the money paid.

It is therefore decreed, that the judgment of the district court be reversed, and that the plaintiffs recover from the defendants, the sum of five hundred and nineteen dollars and seventy-five cents, with interest thereon from the 20th December, 1848, until paid, and costs in both courts.

### C. TOLEDANO v. WILLIAM RELF.

Where a party in an authentic act, confesses the existence of a debt, and authorizes the creditor to enter up judgment without notice or delay, courts have the power, upon the exhibition of such an instrument, to carry into effect the agreement between the parties in the same manner as if the parties were present and confessing in open court. Parties can confess judgment by special power of attorney as well as in person.

Where a judgment rendered with a stay of execution for a certain time, has been recorded in the mortgage office, it operates as a judicial mortgage from the date of its recordation; although the delay for the issuance of the execution may not have expired.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J.* In this suit the controversy was between the plaintiff and *William Ryan*, third opponent. *H. H. Strawbridge*, for plaintiff. *John Gedge*, for third opponent. The judgment of the court was pronounced by

*EUSTIS, C. J.* This appeal is taken by the plaintiff from a judgment of the court of the Fourth District of New Orleans, by which the proceeds of certain slaves in the hands of the sheriff, were awarded to *Ryan*, a creditor by judicial mortgage, in preference to the plaintiff.

The plaintiff claims the proceeds of the slaves by virtue of a special mortgage, bearing date the 14th of February, 1848. This mortgage was given to secure the payment of a draft, of which the plaintiff was the acceptor; which draft was paid at its maturity. We determined, in the case of *Salaun v. Relf*, in which *Toledano* was a party, that *Toledano*, in paying this draft, paid his own debt, which the mortgage was given to secure; and the purpose of the mortgage being thus accomplished, as there was no reservation or qualification in the act of mortgage, and no other object disclosed in it, the mortgage could not be kept alive for any other object, or for the benefit of any other person, not resulting from the tenor of the draft itself. We held, that other mortgage creditors being strangers to the secret equities subsisting between the parties to the draft, their rights must depend upon the record of the debt and mortgage. 4th Ann. 576. We find no reason to doubt the correctness of this decision, and deem it sufficient to refer to the opinion of the court delivered in the case.

The plaintiff also claims precedence of the judicial mortgage of *Ryan*, by virtue of a subrogation to the rights of *Salaun*, a judgment creditor, whose case we

have just stated. But the judgment of *Ryan* was recorded in the mortgage office on the 16th July, 1847, previous to the recording of *Salaun's* judgment.

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*Ryan*, the appellee, is a judgment creditor of the debtors, *John A. and Edward Weysham*. The judgment was rendered, on confession, by the Third District Court, on the 15th of July, 1847. Its validity has been assailed on various grounds by the counsel for the appellant. It appears, that *Ryan* sold his stock in trade of hardware to the *Weysham's* for \$17,401 40, of which \$3000 was received in cash, and for the balance, \$14,401 40, the purchasers subscribed eight several promissory notes, payable at different periods. The sale was by authentic act, which, among other things, provided that the act should import confession of judgment, and that the said *Ryan* should have the right immediately, and before the delivery of the goods, to have judgment entered thereon for the amount of said notes, with interest, without any previous citation or notice; that no appeal should be taken from said judgment, or any notice thereof to the defendants be required, provided that no execution should be taken on said judgment, except on the respective maturity of the notes.

On a petition filed on the same day by *Ryan*, judgment was rendered on this instrument, with a stay of execution, as therein provided, the plaintiff remitting to the defendants the sum of one thousand dollars; an execution was taken out on this judgment, and the defendants appeared, by attorney, for the purpose of setting said execution aside, which rule, after an appearance, was discharged.

We understand the act on which the judgment was rendered, to contain a power to the creditor to enter up, formally, a judgment in a court having competent jurisdiction, which can be legally given to a plaintiff, when the defendant recognizes his right of action and confesses the debt. On the exhibition of an act of this kind, we think, courts have the power to carry into effect the agreements of parties, in the same manner as they would act, were the parties actually present and confessing in open court. In other words, that parties can confess judgment by a special power of attorney, as well as in person. We think, there is nothing in this judgment which rendered it invalid.

We concur with the district judge in the opinion, that there is nothing in the release of *Ryan* of part of the property of the debtors from his judicial mortgage, which affords ground of complaint to the appellant.

The judgment of the district court is therefore affirmed, with costs.

### VALMONT D. TERREBONNE v. MICHAEL WALSH.

The plaintiff had sold a slave, having with her a young child. In the act of sale, no mention was made of the child. He instituted suit for the child. *Held*: That as the right to rescind the sale of the mother was not claimed in the suit, and that, as it appeared, the purchaser was aware of the existence of the child at the time of the sale, the plaintiff must be regarded as the owner of the child, and was entitled to its possession when it reached ten years of age, or upon the death of the mother, if she died before that time; and that, in the meantime, the purchaser must bear the burden of supporting the child.

**A** PPEAL from the District Court of Lafourche, *Randall, J. J. C.* and *A. Beatty*, for plaintiff. *Winchester Hall*, for defendant. The judgment of the court was pronounced by

**SLIDELL, J.** The plaintiff is the administrator of the succession of *Bridget Lyons*. The succession is the owner of a slave, named *Polly*, sold to *Mrs. Lyons*; and the plaintiff claims, by virtue of that sale, the ownership of a young child, which was born of *Polly* before the sale. It does not expressly appear,

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that *Walsh* intended to part with the ownership of the child. The deed of sale expresses no such intention; his retaining possession of the child after the sale of the mother, contradicts, so far as the acts of the parties go, such an intention; and there is, therefore, nothing for the plaintiff's claim to rest upon, but the implication, which, it is said, the law will make in such a case. The law forbids the mother to be sold, separately, from the child, which has not attained the age of ten years; and therefore, it is argued, the child must be considered as an accessory, and as passing with the sale of the mother.

The legislation invoked was dictated by considerations of humanity, and was intended to secure to the child the maternal care during its tender years. We are excluded in this action, and under the circumstances of the present case, from the inquiry, whether the sale of the mother, by reason of her being sold without a simultaneous and concurrent sale of the child, could be rescinded. The ownership of the mother is not now disputed. The sole inquiry which can be entertained in this cause, is, in whom are vested the ownership and right of possession of the child? Our opinion is, that the defendant has not lost the ownership of the child, it being not an accessory of the mother, in an unqualified sense. But until the child has attained the age of ten years, or the death of the mother prior to that event, it cannot lawfully be separated from the mother; and therefore, the plaintiff's action for the possession of the child is well founded.

It is proper to observe, that under the evidence, we must consider the vendee as knowing the existence of the child at the time of the purchase of the mother. If, therefore, the rearing of the child be onerous, the burden is the result of the purchaser's own fault.

It is therefore decreed, that the judgment of the district court be reversed; that the plaintiff recover the possession of the child, mentioned in the petition; that the defendant be enjoined from attempting to separate the child from its mother, until the said child has attained the age of ten years, at which time, or on the death of the mother, if she should sooner die, the said defendant may resume said possession as owner of the child; that the costs of the suit in the court below be paid by the defendant, and that the costs of the appeal be paid by the plaintiff.

### J. BERMUDEZ v. UNION BANK OF LOUISIANA.

The stipulation in bonds given to the Union Bank, that in case of non-payment at maturity, the borrower is to pay ten per cent interest after that time, is obligatory, and the party will be condemned to pay it.

Where a stockholder in the Union Bank, in addition to the usual amount loaned on stock, borrows fifteen per cent on his stock, it will be regarded as a stock loan.

**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Benjamin and Micou*, and *C. Roselius*, for plaintiff. *H. R. Dennis*, for defendant. *Eustis, C. J.*, declined sitting in this cause. The other judges delivered separate opinions.

**SLIDELL, J.** This litigation arises out of two obligations, executed by *Bermudez* in favor of the Union Bank. One of them, is for the loan made to *Bermudez*, as a stockholder, under the 31st section of the charter. The other, is for an additional loan. Both were secured by mortgage.

The first question presented for our consideration is, whether, upon the first obligation, the bank is entitled to ten per cent, after maturity, on the entire principal. This obligation is in the form universally adopted in such cases by the bank since its establishment. Its tenor is as follows:

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"Be it known, that I have, this day, received from the Union Bank of Louisiana, the sum of nine thousand nine hundred and forty dollars, being the whole of my credit as a stockholder of two hundred and eighty-five shares of said institution, which sum I will pay at the banking house in New Orleans, on the first December, 1839, fixed, or renew, according to the provisions of the charter of said bank. The payment of the aforesaid sum of money is secured by a deed of mortgage, passed before A. Mazureau, notary public, in and for the parish and city, under date of the 13th day of December, 1838. New Orleans, 1st December, 1838. (Signed) J. BERMUDEZ."

The mortgage, by which this obligation is secured, and whose terms must also be considered as incorporated in the obligation, contains the following clause: "If the whole amount of his loan, or any part thereof, shall not be punctually paid, whenever he shall be required so to do by the Board of Directors of the Union Bank of Louisiana, then, and from that moment, this present mortgage, by virtue of the 24th section of the act of incorporation aforesaid, shall bear ten per cent interest per annum; and the said Union Bank of Louisiana shall have the right to cause to be seized and sold, the said mortgaged premises, in whose hands soever the same may be found."

The 24th section of the charter enacts, that "the mortgages for stock and loans granted, by virtue of this act, shall bear ten per cent interest per annum, after maturity, if not punctually paid."

The 31st section enacts, that "each and every stockholder shall be entitled to a credit, equal to one-half of the total amount of his shares; provided, that as use may be made of such credit, notes or obligations for the amount, so used, shall be furnished; and the interest thereon shall be annually paid in advance; and the principal shall be paid in equal installments, so that the whole shall be paid at the expiration of twenty years from the passage hereof."

The interpretation which the bank, in its dealings with its stockholders, has uniformly, since its establishment, insisted upon, and which it now invokes, is this, that the stockholder, at the end of the year, should pay the twentieth of the principal, and the annual interest on the balance, in advance, at the rate of seven per cent; and on the fulfillment of this condition, would enjoy the privilege of renewal. But if he fails to fulfill this condition, the whole amount of the loan matures, and is exigible, with ten per cent thereafter, and the mortgaged property may be seized and sold, to enforce payment. The term, says the appellant, was granted only on condition, that you, the stockholder, diminish your indebtedness and pay interest in advance. In not doing so, you weaken the security of the bank; for your slaves are growing old, your buildings are wearing out, and besides, you deprive the bank of the profits it might make, by using, in its banking business, the money you ought to have paid, and which you seek to keep at seven per cent interest, although you borrowed it at the higher rate of seven per cent discount. Your punctual fellow-stockholders, since the existence of the corporation, have acquiesced in this view of their duty, and have paid their installments and interest, in advance, accordingly; thus contributing to enrich the funds of the bank, in which, when a distribution of profits takes place under the charter, you will claim to be an equal participant.

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On the other hand, the appellee contends, that in no event is he bound to pay more than the twentieth at the end of each year; and that even, if he neglects to pay an installment at the end of the year, and to pay the interest on the balance in advance, the balance of the principal is only exigible by installments, and interest on that balance runs only at seven per cent. To charge him ten per cent interest, is to charge him, it is said, a penalty for not having paid what is not due.

We have stated the conflicting pretensions of the parties, but we do not consider it necessary to discuss them at length. This same question was, some years since, considered by this court, after elaborate argument at bar, in the case of the *Union Bank v. Guice*, 2d Ann. 250, and was then decided. We are still satisfied with the opinion, for the reasons then stated. But it is proper to add, that, at this late day, when the bank is liquidating its affairs, after having dealt with its stockholders who stand towards each other in the relation of partners, upon that view of their liability during nearly twenty years, we would scarcely be permitted to treat the question as an open one.

The next question presented for our consideration is, whether the bank is entitled to recover more than seven per cent interest, after maturity, upon the other bond. Our conclusion is, that the stipulation for ten per cent interest, after maturity, must be enforced. The subject has been considered in the opinion prepared by Mr. Justice Rost. There has been some difference as to our reasons for adopting this conclusion; but, in the conclusion itself, we all concur.

The only remaining matter is, what credits are to be allowed for alleged payments. It seems to us, there was error in the decree below, in allowing a credit of eight hundred and seventy-five dollars on the 25th June, 1844; and that the view taken, as to that item, by the appellants counsel, is correct. We have also doubts as to the allowance of another item of credit, claimed by the debtor, beyond the amounts credited in the bank's account. As the account has to be reformed, in consequence of the opinion of this court, on the subject of interest, we shall, before expressing a definitive opinion as to the credits claimed, direct a reference to auditors, unless the parties can agree upon a statement.

January 26, 1852.—Since the foregoing opinion was read, some days have elapsed, and the parties have not agreed upon a statement. We have concluded to remand the cause, for the purpose of having the question of credits re-examined.

It is therefore decreed, that the judgment of the district court be reversed; and it is further decreed, that this cause be remanded for a new trial, and for further proceedings, according to the legal principles on the subject of interest, stated in the opinion of the court; the appellee paying the costs of the appeal.

Rost, J. The district judge was of opinion, that the additional loan of fifteen per cent on the amount of the stock, was not a stock loan within the meaning of the charter, and that ordinary mortgage loans do not come within the penalty attached by the 24th section to a default, but under the dispositions of the 9th section, which is the law of the corporation in regard to the rate of interest it may exact. He accordingly reduced the interest on the bond given for that loan to seven per cent. In this, we think there is error.

This loan was reviewed by the board who authorized it, (the defendant being one of them,) as an extension of the stock loan, and we are not prepared to say that it might not be viewed in that light against all the stockholders who availed

themselves of it. But we will consider the case as one of an ordinary loan on mortgage.

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The provision of the 24th section is, that the mortgages for stock and loans granted by virtue of the charter, shall bear ten per cent interest per annum after maturity, if not punctually paid.

The expressions used are extremely ambiguous; but we are of opinion, that the interpretation by which the section is extended to all loans on mortgage, is the only one by which effect can be given to every part of it, and that it is most consonant with reason.

The subscription for stock is not to be paid up; there is, therefore, no such thing as the maturity of the stock itself, and if the literal sense is to be followed, the first part of the section is entirely without meaning. But a reasonable meaning is easily found, if the letter of the law be disregarded, and the intention of the Legislature ascertained. The charter provides that every stockholder shall be entitled to a loan of fifty per cent on his stock, and contains no express provision that any mortgage, besides the stock mortgage, shall be given to secure that loan. The Legislature evidently viewed the stock mortgage as the security for the stock loan, and they must have meant by the maturity of the stock, the maturity of the installments of the loan made upon it, or they meant nothing at all; a conclusion to which a court of justice cannot come.

We must believe that the first part of the 24th section applied to stock loans, and that the loans subsequently mentioned, are the ordinary mortgage loans. The two together, constitute the mortgages granted by virtue of the charter, to which this section has express reference.

This construction is corroborated by other dispositions of the charter. Sections 26 and 27 provide, that the right of the bank to cause to be seized and sold, property mortgaged to them, shall remain unimpaired by respites obtained, or voluntary surrenders made by their debtors. Although these sections would seem to have reference to ordinary mortgages only, the board has uniformly claimed and enjoyed the privilege which they give in cases of loans on stock.

So, the section which authorizes married women to bind themselves with their husbands, though not including in terms stock loans and mortgages, was clearly intended to apply to them.

But if it were true, that the 24th section was originally susceptible of a different interpretation, it has been so understood by the stockholders, the board of directors, and the customers of the bank, during the entire existence of the charter; and this understanding of it, has materially increased the profits soon to be divided between the plaintiff and the other stockholders. To disregard now that interpretation, would be contrary to justice and subversive of all rules of sound construction.

PRESTON, J. I concur in the opinion delivered by Judge Rost.

### GREENWOOD LEFLORE v. JAMES G. CARSON.

The vendor has no privilege, unless his act of sale be recorded in the office for recording mortgages.

A sale cannot be annulled for the non-payment of a portion of the price, where the parties, from their transactions, have rendered it impossible to place each other in the same situation they were in before the sale was made.

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| 48  | 815 |
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| 7   | 66  |
| 125 | 191 |

LEVYONE  
v.  
CARSON.

**A**PPEAL from the District Court of Carroll, *J. N. T. Richardson, J. Stacey and Sparrow*, for plaintiff. *A. B. Caldwell*, for defendant. The judgment of the court was pronounced by

**SLIDELL, J.** The plaintiff sues as endorser of a note, given by the defendant to *Halsey*, the payee, for part of the price of a plantation, bought by the defendant from *Halsey*. The note, on its face, states its consideration, and that its payment is subject to the conditions contained in the act of sale.

The defendant excepted that the suit was premature. He also excepted, that if it was not premature, all further proceedings should be suspended, until the plaintiff, or *Halsey*, should give him security to protect him from disturbance, with which he alleged he was threatened by *J. F. Butler*, the transferee of a claim formerly held by *A. P. Merrill*. These exceptions he founds upon a stipulation contained in the act of sale for the suspension of the payment of this and other notes, upon certain contingencies. The stipulation, which is prolix, need not be set out at length. It is sufficient to quote the averment in the defendant's plea, which is in these words: "The true meaning of the above stipulation is, that said *Carson* was thereby to be protected from all danger of having to pay the note sued on in said suit, number 537, in order to preserve his title to the land conveyed to him by said act of sale."

For the proper consideration of the defence, it is necessary to state the material facts, which are complicated.

In May, 1837, *McDonald* mortgaged to the the Union Bank, a plantation and slaves, in the parish of Carroll, to secure a loan of \$50,000. In June, 1837, he executed another mortgage on other slaves in the same parish, as security for the same debt. Both mortgages were, in June, 1847, inscribed in the mortgage book, kept in the office of the parish judge of that parish. At the time of executing these mortgages, all the property was unincumbered, and *McDonald* appeared on the public records as its sole owner. In 1836, *McDonald* had given a bond *sous seing privé*, to *J. M. and B. H. Payne*, to make them title to half of the plantation and slaves; and a few days afterwards, the *Paynes* and *McDonald* formed a partnership as cotton planters, which lasted until 1841. On the 21st June, 1837, immediately after *McDonald* had completed his loan from the Union Bank, he, in compliance with his bond, executed before a notary public, a deed of sale to the *Paynes*, of an undivided half of the plantation and slaves, for the price of \$60,000, namely, \$10,000 cash, and the balance in six notes. One of these notes was transferred to *Merrill* in 1838, or subsequently.

The deed declared that *McDonald* was to pay one-half of the loan of \$50,000 obtained of the Union Bank, and the *Paynes* the other half, no mortgage for the price was stipulated in the deed, as is usually done. This conveyance was recorded in the record book of alienations, in the proper office of Carroll parish, but was not inscribed in the record book of mortgages. It is proved, that a separate book for recording mortgages had been kept in the office of the parish judge since 1833. In 1841, soon after the dissolution of the partnership between the *Paynes* and *McDonald*, the former executed to the Union Bank a mortgage for \$31,656 45, upon the portion of the property which fell to them in the partition of the property made with *McDonald*. This mortgage was given in pursuance of the stipulations of the act of partition, and of the undertaking in the deed of purchase in 1837, by which they promised to pay one-half the Union Bank debt. It was accepted by the Union Bank, upon the certificate of the recorder of mortgages of the parish of Carroll, that there was no mortgage



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upon the property in the name of the *Paynes*, and none in any other person's name, except that of *McDonald* to the Union Bank for \$50,000 above mentioned. It was duly inscribed in the book of mortgages in Carroll parish, in August, 1841. Under this mortgage, the property was seized and sold to *White* in 1845. *White* sold the land to *Halsey*, and in 1846, *Halsey* sold to the defendant, as above stated. *Merrill*, as the holder of one of the *Payne* notes, claimed the vendor's privilege on the land; other persons also had claims. *White* bought at the sheriff's sale, made under the Union Bank mortgages, for the sum of \$41,750 cash, and brought suit against the Union Bank and the other creditors, who claimed privileges and mortgages, in order to settle the question of priority among them, and determine to whom the purchase money belonged. *Merrill*, thus made defendant, asserted that, as holder of the note of *J. M. and B. H. Payne*, he had the privilege of vendor upon the property thus sold and its proceeds; he denied the existence of any mortgage rights in favor of the Union Bank, and prayed that he might have judgment for so much of the proceeds of the plantation as would satisfy his claim. There was judgment classing the creditors as follows: 1st, The Union Bank; 2d, *Halsey*; 3d, *January*: thus giving them all precedence over *Merrill*, whose claim of the vendor's privilege was rejected upon the ground of non-registry. See the case of *Mauvel White v. The Union Bank*, 6th Ann. 162.

The correctness of the decision in the case just mentioned, is not now questioned. Indeed, the matter is *res judicata* between *Merrill* and *White*, under whom the present parties hold. There is, therefore, no possibility of disturbance by reason of an outstanding vendor's privilege in favor of *Butler*, *Merrill's* transferee.

But, it is said, that there is still danger of disturbance, because the decision in that case turned only upon the question of the vendor's privilege. A vendor, it is argued, who has neglected to record his privilege, is not remediless as against subsequent mortgagees, but may still relieve himself through the resolutive condition implied in the contract of sale, and recognized in the 2539th article of the C. C., which declares, that if the buyer does not pay the price, the seller may sue for the dissolution of the sale.

If, for the purposes of the present inquiry, the general proposition be conceded, there are circumstances in this case which would render it unavailable to *Butler*, who, it seems, has threatened *Carson* with proceedings for a dissolution of the sale made by *McDonald* to *Messrs. Payne*.

If the sale by *McDonald* to the *Messrs. Payne* is to be rescinded, this cannot be done without restoring the vendor and the vendees to their original position. The dissolving condition, says the code, (art. 2040, *La condition resolutoire*,) is that which, when accomplished, operates the revocation of the obligation, placing matters in the same state as though the obligation had not existed. *La resolution replace les parties, dans l'etat où elles se trouvaient avant la vente*. Troplong, *vente*, No. 654. How is *Butler* to replace matter in *status quo*? He is the mere holder of one of the notes. He is not the vendor, nor any thing more than a partial representative of the rights of the vendor. But *McDonald*, the vendor, and the vendees, have done act upon act inconsistent with a resolution of the sale. They gave the mortgages to the Union Bank, which eventuated in the sale to *White*. They made a settlement of their partnership accounts and a partition in kind of the land and slaves. It is obvious, therefore, that the pretensions of *Butler* to sue for a dissolution of the original

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sale, "are unfounded, and that the apprehensions of eviction by *Carson* are unreasonable. See C. C. 2535.

It is therefore ordered, adjudged and decreed, that the judgment of the court below be reversed; and it is further ordered and decreed, that the plaintiff recover of the defendant the sum of \$5,016, with interest from the 1st of January, 1850, until paid, at the rate of eight per cent per annum, and costs in both courts; and that the mortgaged property, described in the act of sale and mortgage between *A. Halsey* and *James G. Carson*, annexed to, and made part of plaintiff's petition, be seized and sold, to satisfy the judgment aforesaid in favor of the plaintiff.

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### ROBERT GARLAND et al. v. THOMAS M. JACKSON et al.

Where, in conformity to an act of the Legislature, the trustees of a sixteenth section granted by Congress for public schools, have leased the same for fifty years, the contract is valid. There is nothing unconstitutional, or contrary to the laws of the United States, in such a contract.

**A** PPEAL from the District Court of Madison, *Copley, J. Alonzo Snyder* and *J. Bemiss*, for plaintiffs. *Stacey* and *Sparrow*, for defendants. The judgment of the court was pronounced by

PRESTON, J. By the Constitution of the United States, power is given to Congress, to make all needful rules and regulations respecting the territory or other property of the United States. This has been always construed, as giving Congress power to sell the public lands, or otherwise dispose of them for public purposes.

Shortly after the cession of Louisiana to the United States, by the eleventh section of an act of Congress, approved the 21st of April, 1806, the President of the United States was authorized to offer for sale, such of the public lands lying in the Western District of the Territory of Orleans, as were surveyed, with the exception of section sixteen, which, in the language of the act, "shall be reserved, in each township, for the support of schools within the same,"

The sixteenth section of every township of the public lands of the United States, have, from the adoption of the Constitution, been reserved from public sales, for the maintenance of public schools in the township; and this reservation has always been considered a grant to the State in which it lies, on the admission of the State into the Union. It must amount to a grant; because Congress have no power, under the Constitution, to administer property for the purposes of education, within the limits of a sovereign State; and, in selling public lands, Congress, having reserved a portion for the support of schools within the township, as an inducement to purchasers to bid and buy, could never, in good faith, revoke the reservation.

The reservation must, therefore, necessarily be administered under the authority of the State. Still, as there might be doubt as to the title, in case the State should sell the lands reserved for the purposes of education, because the term reserved, instead of granted, was used, Congress, in 1843, passed an act, authorizing the States of Illinois, Arkansas, Louisiana and Tennessee, to sell lands which had before been appropriated to schools. It is unnecessary to

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inquire into the constitutionality of a clause in the law, authorizing those States to lease the lands, for a term not exceeding four years; for, however wise the provision, it does not purport to affect anything done by the States, in the previous administration of those lands. On the contrary, a clause in the law sanctioned all sales made by those States, and, by a reasonable inference, all leases previously made.

In 1835, our Legislature directed the citizens of township 17, range 13 east, then in the parish of Carroll, but now in Madison, to elect three trustees, with power to administer all the school property and funds in that township, and, especially, to lease the school lands for an annual rent. Being, probably, unable to lease them for an annual rent, at the next session of the Legislature, in 1836, their trustees were authorized to lease them, for a term of years not exceeding fifty years, payable in five annual installments. In pursuance of these acts, in May, 1836, the trustees leased to *Honoré P. Moraney*, 320 acres of those lands, for the term of fifty years, for twelve hundred and sixty-eight dollars, payable on the terms prescribed.

The land is now in the possession of the defendants under that lease, and the plaintiffs, the present trustees, bring suit to recover it, and, in effect, to annul the lease. They cannot do it. The State of Mississippi leased their school lands, acquired in the same manner, for a term of ninety-nine years, and the Supreme Court of that State held the leases to be valid. The laws under which the defendants hold the lease, however unwise, expressly gave power to the trustees to lease the land for that term. They conflicted with no act of Congress, or the Constitution of the United States. The lessees acquired a vested right in the lease, by bidding for it at public auction, on the terms prescribed by the Legislature, and paying the price; and it would be a violation of our Constitution to deprive them of it.

The judgment of the district court is reversed; and it is decreed, that there be judgment for the defendants, with costs in both courts.

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### ELEANOR GRAVES v. NICHOLAS BARNES.

The administrator of an estate owes interest, by operation of law, to the heirs from the time of the settlement of his account, and will be condemned by the court to pay it, although not prayed for in the petition. C. P. 1007.

**A** PPEAL from the District Court of Madison, *J. N. T. Richardson, Jr. Hynes and Perkins*, for plaintiff. *Bemiss*, for defendant. The judgment of the court was pronounced by

**PRESTON, J.** The tatrix of *Joseph Barnes*, a minor, sues the administrator of his father's estate, for seven hundred and seventy dollars and fifty cents; and of his grandmother's estate, for thirteen hundred and nine dollars and thirty-five cents.

The administrator contends, that the first of those sums has been paid to *James Williams*, as the owner of a judgment for a large sum, which *William Cotton*, deceased, obtained against the father.

*Williams* has intervened, and maintains the same thing; and further claims, that the \$1309 35 cents, claimed by the minor, as coming to him from his grand-

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mother's succession, belongs to him, as holder of the judgment of *Cotton*, against the father. There is no pretence for this last claim. The grandmother died after the father of the minor, and the latter inherited directly from her.

As to the \$770 50, claimed for the minor, as coming from his father's succession, we think the verdict and judgment erroneous. *Williams* purchased the judgment against the father before his death. The allegation in the petition, therefore, that the administrator of the father purchased for one hundred dollars through *Williams*, the large judgment against the succession, with the funds of the succession, cannot be well founded.

The objection of the defendant, that interest was allowed on the \$1309 35, from the judicial demand, because not prayed for in the petition, is not tenable. The claim bore interest, by operation of law, from the settlement of his account, as administrator, with the heirs of *Abby Barnes*. C. P., art. 1007.

The judgment of the district court is reversed; and it is decreed, that the plaintiff recover from the defendant, the sum of thirteen hundred and nine dollars and thirty-five cents, with legal interest from the 21st April, 1848, with costs in the district court; and that the appellee pay the costs of the appeal.

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### WILLIAM R. PECK v. JOHN H. OVERTON.

A petitory action for land, can only be maintained against the possessor or owner. C. P. art. 43.

A personal action must be brought in the parish in which the defendant resides.

**A**PPEAL from the District Court of Madison, *Farrar*, J. *J. L. Amonett*, for plaintiff. *Alonzo Snyder*, for defendant. The judgment of the court was pronounced by

**PRESTON**, J. Suit was brought by the plaintiff against the defendant, to compel him to make a formal conveyance of a tract of land, which, as he alleged, he had purchased from his agent, and was ratified by his attorney in fact; and, indeed, that by silence, when he should have spoken, he assented to the sale himself. The defendant excepted, that it was a personal action; that he resides in the parish of St. Landry, and that he was not subject to the jurisdiction of the district court for the parish of Madison. The exception was overruled, an amended petition having been filed by leave of the court. The amended petition alleges, that the defendant had the actual possession of the land in controversy, and claimed it as owner. The defendant excepted again, that he had not possession of the land, nor claimed it as owner; that a petitory action could not be maintained against him, because he was not in possession or owner of the land; and that a personal action could not be maintained in that court, because he resided in the parish of St. Landry.

We have been unable to find, that this last exception was formally overruled by the court. The defendant, however, acknowledges, in his answer, that it was overruled. It appears, by entries and evidence, that it was tried, and the defendant insists upon it in this court. He cannot be deprived of the right by a judgment, by default taken at the very moment of filing papers, of which *oyer* was asked, without assigning any reasons for the default. He filed his exceptions the next day, which certainly was all that could be reasonably required. The judgment by default seems to have been disregarded by all parties.

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On the trial of the exception, the defendant showed that he had made an agreement to sell the land to *Mrs. Bemiss*, a month before the suit was brought. The agreement was absolutely binding upon him, and, as to him, amounted to a sale, although sixty days was given to *Mrs. Bemiss* to accept and comply with the conditions. It was proved, further, that *Mrs. Bemiss* was actually in possession of the land at the time the suit was brought. The defendant was not liable to a petitory action for land of which he was not in possession, and which he had sold. The suit could only be brought against the possessor, or owner. C. P., art. 43. For any personal claim against him, the suit should have been brought in the parish of his domicile. C. P., art. 162.

There seems to be less reason for rejecting the exception, as on the very day it was tried, suit was brought by the plaintiff against *Mrs. Bemiss* for the land, which suit is still pending, the defendant being called in warranty.

The judgment of the district court is reversed; and it is decreed, that the defendant's exception be sustained, and the plaintiff's petition dismissed, and that he be condemned to pay costs in both courts.

### M. and B. MULLEN & Co. v. AMAS and ROE.

Where an attorney at law purchases a judgment which is pending on appeal, it will be regarded as a litigious right, and the purchase declared void.

**A**PPPEAL from the District Court of Madison, *J. N. T. Richardson, J. Stockton and Steele*, for plaintiffs. *A. Snyder*, for appellant. The judgment of the court was pronounced by

**SLIDELL, J.** Under a *fiery facias* issued against *Amas and Roe*, the defendants in this cause, certain lands were seized as their property. *A. R. Hynes* became the purchaser at sheriff's sale, at the price of \$3,800, and directed the sheriff to credit his bid upon the *fiery facias*. Afterwards, *Hynes* took a rule upon *M. and B. Mullen & Co.*, to show cause why his bid should not be credited as cash upon the execution, and why he should not be decreed to be subrogated to all the rights accruing under said judgment. These pretensions of *Hynes*, rest upon an alleged sale, made at auction, to one *Devereux*, in the insolvent proceedings of *Kertan*, a member of the firm of *M. and B. Mullen & Co.*, which was composed of three partners. The defendants in the rule, resist the application of *Hynes*, alleging, in their answer, that the claim, when purchased by *Hynes*, was a litigious right, which, he being an attorney at law, was incapable of purchasing; that any apparent interest held by *Devereux*, was held by him as a trustee, for the benefit of their firm; and that *Devereux* was induced to sell *Hynes* the judgment, by his representation, as to its value.

The district judge considered the purchase by *Hynes* void, upon the ground, that it was the purchase of a litigious right by an attorney at law, there being an appeal by *Amas and Roe*, pending at the time. His decree annulled the sale, and directed that the five hundred dollars, the price paid by *Hynes* to *Devereux*, be credited on the bid made by *Hynes*, at the sheriff's sale. *Hynes* has appealed.

Considering the nature of the claims sold, the possession of the purchaser, who was also attorney of record for *Amas and Roe*, and his representations as to the value of the claim, as testified by *Devereux*, we are of opinion that the appellant is not entitled to a reversal of the judgment. See *Copley v. Lambeth*, 1st Ann. 317. C. C. 2422, 2624, 1841.

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AMAS.

It is said, that in consequence of the previous insolvency of *Kervan, M. and B. Mullen & Co.* were incompetent to bring suit against *Amas and Roe*, and stand in judgment. We are by no means prepared to say, that *Amas and Roe* could now make any such objection to the judgment. But, at any rate, the alleged irregularities do not concern the plaintiff in this rule. As an actor, he must rely on the strength of his own title, and not on the weakness of his adversaries. Moreover, in asking a subrogation, he has affirmed the judgment. So, also, the appellant is not competent to raise questions in this proceeding, which concern the creditors of *M. and B. Mullen & Co.* That their interests have been disregarded and violated by the defendants in rule, there is strong reason to believe. But those creditors, if such be the case, will have an equitable right to claim the benefit of this large judgment against *Amas and Roe*, as an asset of their debtors; while, on the contrary, the success of the appellant would be hostile to their interests. The decree of the district judge has reached the justice of the case, so far as it was in his power to do so under the rule; and it is therefore affirmed, the appellant to pay the costs of the appeal.

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#### MUNICIPALITY NO. TWO, FOR OPENING EUPHROSINE STREET.

The act of April 3d, 1832, for opening streets, &c., in the city of New Orleans, is contrary to the article 109 of the Constitution of the State, so far as it authorizes private property to be taken for public uses, without an adequate compensation *previously* made.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. R. Hunt and H. D. Ogden*, for appellees. *Lockett and Griffon*, for appellants. The judgment of the court was pronounced by

PRESTON, J. This is an application by the Second Municipality of New Orleans, to open Euphrosine street, from Hercules to Liberty streets, in pursuance to the act of the 3d of April, 1832. For that purpose, a parcel of ground belonging to *François Saulet*, having forty-five feet on Hercules street, and extending through to Benton street, on which it has the same front, is to be taken.

By commissioners of estimate and assessment, duly appointed and sworn, the portion of ground was appraised at two thousand dollars (\$2000), and the buildings and improvements on the same, at three thousand five hundred dollars (3500)—\$5500.

Provision for his payment was made, by estimating the advantages of the improvement of the municipality to him and to others, in which the advantage of the improvement to the square, from which the property was to be taken, and to other lots belonging to him, was estimated at \$1623 50; leaving to be paid to him, \$3876 50.

He and others opposed the report, and on the 23d of January, 1849, it was referred back to the commissioners for amendment.

After long investigation and consideration, on the 1st of October, 1849, they filed an amended report, in which they estimate the lot, to be taken from *François Saulet*, for the contemplated improvement, at \$3000, and the buildings and improvements on the same, at \$3000—aggregate, \$6000; and estimated that his square and other property would be benefited to the amount of \$1947, leaving to be received by him, \$4053.

*François Saulet*, also opposed this report, alleging, that the property to be taken from him was valued too low; and without denying the right of the municipality to assess his property for the improvements to be made, alleged, that the amount assessed was too high.

He also claimed, under article 109 of the Constitution, that he should be paid, in cash, before the property was taken from him, its value.

The additional value that would be added to *François Saulet's* property, by the contemplated improvement, is fully proved by his own witnesses. *Moore*, a real estate broker, *Southmayd*, a vendor of lots in the vicinity, and *William Stackhouse*, who, by the particulars he mentions, is manifestly well acquainted with the value of property in the neighborhood, and its advantages and disadvantages, all agree that he would be benefited about two thousand dollars.

The commissioners allow him six thousand dollars for the aggregate value of his ground and buildings, to be taken for the improvement. *Stackhouse*, his own witness, states, that it is a pretty high estimate, and none of the witnesses prove that the estimate, in the aggregate, is too low; although *Southmayd* and *Rub* think the lots, to be taken separately from the buildings, should be estimated higher than three thousand dollars.

The testimony of the witnesses satisfies us, that the commissioners, on the whole, have done *Mr. Saulet* full justice. If, however, the evidence left any doubt on the subject, it is to be considered that the commissioners of estimate and assessment, in the words of the act of 1832, "are discreet and disinterested persons, competent to serve as jurors in the court, and sworn, faithfully, impartially, and according to the best of their skill and judgment, to perform the trust and duties required of them by the act;" that they are not chosen by lot, as ordinary jurors, but selected and appointed by the judge, and should be so appointed, on account of their great skill and competency to perform the special duties required by the act, and are to be allowed four hundred and fifty dollars, with the fees of a clerk, for their services in this very case; that they made two reports, or rendered two verdicts, if we may so speak, for the law likens them to jurors; the last of which, being more favorable to *Mr. Saulet*, was approved by the court, after hearing witnesses in opposition, for reasons which are entirely satisfactory to us. We are bound to give as much weight to his judgment, approving the report, as we would to an ordinary judgment, based upon the verdict of a jury, and the refusal of a new trial, after examining new evidence, in opposition to the verdict.

We do not think, however, that the district court should have altered the report, by allowing *Haywood Stackhouse* any part of the appraised value of the buildings. If the evidence had justified it, the assessment should have been referred back to the assessors, for the purpose of making the amendment under the decision of this court, in the application for the opening of Claiborne street. 4th Ann. 7. We think, however, the evidence would not justify the reference. The buildings became the property of *Saulet* on the 1st November, 1848, as appears by the contract between them. For the buildings erected under the first lease, were estimated in the second lease, made the 5th of October, 1847, at three thousand dollars, and to be insured at that sum. We presume, these are the buildings to be taken for the improvement, as we have no evidence that *Stackhouse* had erected the additional buildings contemplated by the second lease, and to cost a thousand dollars. On the contrary, he left the premises, the first of February, 1848, a few months after the second lease was signed.

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Had *Stackhouse* presented a distinct claim for damage, which the contemplated improvement would cause him as lessee, it is possible something would have been allowed him by the commissioners, because he was entitled by the lease, from *Saulet*, to occupy the buildings until 1852, upon the conditions of paying four hundred and eighty dollars rent per annum, and erecting other buildings of the value of one thousand dollars, to become *Saulet's* at the expiration of the lease.

But instead of claiming indemnification, as a lessee in case of eviction, he left the premises, even before the second lease was to commence, and claimed the value of buildings, which did not belong to him, because erected under the first lease, and became *Saulet's* before his claim was filed.

The demand of *Saulet*, to be paid in cash the value of his ground and buildings, before the municipality is put into possession of the same for the purposes of public utility, is clearly accorded by article 109 of the Constitution. The provisions of the act of 1832, to the contrary, are repealed by article 142 of the Constitution; and the strict enforcement of this equitable and salutary provision of the Constitution, is not only a sacred duty of this court, but will, probably, greatly tend to restrain the waste and extravagance growing out of public improvement, which, we fear, will become a burden to this, as it has been to many other cities.

The judgment of the district court is therefore reversed, and it is decreed, that the report of the commissioners of estimate and assessment of damages and benefits, made on the first of October, 1849, be approved and homologated; and it is further decreed, that the delivery of the property to Municipality No. Two, for the purpose of opening Euphrosine street, shall not be enforced, until payment to *François Saulet*, of four thousand and fifty-three dollars; and that the municipality pay one-half the costs of this appeal, the other half to be paid by *Haywood Stackhouse*.

SLIDELL, J., dissenting. The principle that private property should not be taken for public use, without provision being made for a just compensation to the owner, was undisputed before the adoption of the present Constitution. An express recognition of it, in a particular case, is found in the 489th article of our Civil Code. But the framers of the Constitution of 1845, have wisely protected the citizen by an additional safeguard, and have forbidden the divestiture of a vested right, for purposes of public utility, unless an adequate compensation be previously made. Without this clause, there might be room for difference of opinion, whether the compensation should precede, or might follow, the exercise of the right of eminent domain. Authorities might be found to sustain the position, that a previous provision for making such compensation, would suffice; while other minds, more strongly impressed with the necessity of jealously protecting private right from the encroachments of public power, would adopt the stringent doctrine of previous indemnity. Under the 109th article of our Constitution, it seems to me, that question is put at rest.

It is necessary, then, to apply that clause of our Constitution to the statute, under which these proceedings for the opening of Euphrosine street, have been conducted, and consider whether some provisions of the statute are not incompatible with it.

The theory of the statute is, that where a proprietor has a piece of land, of which a portion only is taken for the proposed street, or public highway, he is to be paid, not the value of the land so taken, but the excess of damage over benefit; that is to say, the commissioners shall estimate the value of the land



taken, and the enhancement, if any, which, in their opinion, will result to the land left, and award him the excess.

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The Constitution guarantees to the citizen, that his property shall not be taken from him, for a purpose of public utility, without an "adequate compensation previously made;" and, in my opinion, the only safe construction of those terms is the previous payment to him of the money value of the property taken. When you pay him, in the supposed prospective benefit which may accrue to other property belonging to him, you do not pay him in money, but in that which is uncertain and dependent on opinion and accident.

The constitutional difficulty is not at all obviated by the fifth section of the statute, which gives the proprietor, a part of whose land is taken, a right to surrender the whole at the estimated price of the whole. This right is clogged with many disadvantages and unconstitutional conditions. The citizen is obliged to declare his election and surrender his title, before the money is tendered to him; and when he has so elected, he is bound, and the public are not. For it has been held, that until the tableau of assessment is confirmed, the municipal body may discontinue the proceedings, and the whole matter then falls to the ground.

The system of expropriation, provided in this statute, which was borrowed from another State, is not only liable to gross abuse, but, as far as my observation of its working enables me to speak, has been often an instrument of hardship and injustice. In one of the northern States, as I have been informed and believe, the evil was, at one time, carried to an alarming extent, and substantial landholders, under this system of improvement, were sometimes converted into paupers.

What is the practical working of the system in the present case? *Saulet* is in the quiet enjoyment of a piece of ground, and a rental of four hundred and eighty dollars a year for a portion of it, which is built upon, the rest being vacant. The municipality says: We consider the public good will be promoted by taking your house and a part of your land from you, to make a street. The house and lot are worth six thousand dollars. We will pay you a part of this in money. But, we think, if you will put up houses on the rest of your land, or sell it, you will do better with it, than if the street had not been made. *Saulet* may, perhaps, reply: I have no means to build; I do not want to sell; and the expectation of enhanced value, is not a certainty. But the municipality rejoins, that does not matter. Here is part of the value of your house and ground, in money. For the residue, we give you, in payment, the opinion of our commissioners, that your vacant land will be hereafter worth more, and the chance of that opinion being realized. Instead of gold or silver, we give you a probability.

Whether after the effects of an opening of a street have been actually developed, and the advantage, in an increased value of the portion left to the proprietor, has been actually realized, he might not be lawfully assessed with reference to such benefit, is another question, which need not now be considered.

Being of opinion, that the judgment of the district court, in this matter, rests upon an unconstitutional basis, I think it should be reversed.

Besides these considerations, the tableau of assessment seems to me, on its face, inconsistent in several instances with the theory upon which it purports to be made, and the theory of the statute; and there are, also, discrepancies between this and the previous tableau or report, which I am unable to comprehend.

## MUNICIPALITY NUMBER TWO, FOR THE OPENING OF ROFFIGNAC STREET.

The act of 3d of April, 1832, for the opening of streets, etc., in New Orleans, is not unconstitutional in cases where, in proceeding under it, provision is made for payment for the property before the expropriation is effected.

On the Mississippi river, the levee is, by law, considered as the bank; and the use of the batture between the line of that levee and the stream, is in the public. The commissioners appointed under the act of April 3d, 1832, for the opening of streets, etc., in New Orleans, have no right to assess the adjacent property for opening a street on such batture, the use of which was already in the public. But if the levee be advanced by the municipal authority, and the public use extinguished, the batture would become private property, which, if taken for public use, should be paid for, and the commissioners would have the right to make an assessment for that purpose.

In making the assessment under the act of April 3d, 1832, for opening streets, etc., the only lots subject to assessment are those adjacent to, or fronting that part of the street so improved. The owners to whose land a new front is given or added to, are alone subject to contribution for paying for it.

**A**PPEAL from the Third District Court of New Orleans, *Kennedy, J. R. Hunt*, for Municipality Number Two. *A. K. Josephs*, for *Shepherd*. *Gri-vot*, for *McDonough*. *H. H. Strawbridge*, for *Hoffman et al.* *Alexander Walker*, for *Donovan*, appellee. The judgment of the court was pronounced by **EUSTIS, C. J.** On the 23d of August, 1847, the Second Municipality of New Orleans applied, by petition addressed to the Third District Court of New Orleans, for the widening of Roffignac street, between New Levee and Front streets, under the act of the Legislature, passed on the 3d of April, 1832, entitled an act to regulate the opening, laying and improving streets and public places in New Orleans, etc. After a long litigation, a final judgment was rendered on the 19th of January, 1850, by which an amended report of the commissioners appointed by the court was homologated, the oppositions filed to said report having been dismissed. From this judgment, the Charity Hospital, the heirs of *John Grass*, the Second Municipality, and *R. D. Shepherd*, have appealed.

The land required for the widening of the street, was a lot at the corner of Front street, which projected some forty-seven feet in its whole depth on the ordinary width of Roffignac street, and which, by being brought into the street, extended its upper boundary in a direct line to Front street, thus giving a uniform width to the street to be opened. It belonged to *John Donovan*, and was assessed in the report of the commissioners at six thousand dollars. This lot fronting on the river, the batture in front of it was estimated with it, at the additional sum of six thousand dollars. Both lots are included in the proposed expropriation, and the street extended in its full width to the river; the assessment being of twelve thousand dollars for the property taken, with all its rights and dependencies.

One of the grounds of the oppositions to the report and assessment of the commissioners, in which the municipality itself has united, is that which puts in issue the title of *Donovan* to the lot. It is contended, that the lot is public property, and dedicated to public use, and, consequently, no legal assessment can be made on the parties to indemnify *Donovan* for its application to public pur-

poss. This question, as to *Donovan's* title, has been very fully presented by his counsel, and by the counsel for the appellants, in written arguments. A careful consideration of the evidence has put beyond doubt, in our minds, the correctness of the decision of the district judge upon it; that the property has not been dedicated to the public use; and that, so far as the appellants are concerned, it belongs to *Donovan*, and, if taken by the municipality, must be paid for, at its value.

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Besides the written arguments of the counsel of *Donovan* and the Charity Hospital, we have also before us those of the heirs of *Grass* and of *M. W. Hoffman*, one of the appellees. They present various questions involving the legality of the mode and the amount of the assessment, and the constitutionality of the statute itself, under which the present proceedings have been instituted and conducted.

The delegation of the sovereign power of eminent domain, of appropriating private property to public use, to municipal corporations, is not unusual in the legislation of the several States. Its exercise has given ground for serious complaint, and the power in the hands of unscrupulous or heedless men may be made an engine of great injustice and oppression. The constitutionality of the laws providing for the expropriation of private property, for the purpose of establishing streets and other public places, and of forcing the proprietors of estates in the neighborhood, who are presumed to be benefited by the change, to pay for the land thus taken for public places, by subjecting their land to a contribution in the form of rateable assessment, has been more than once questioned. The subject has been recently very thoroughly examined by the Court of Appeals, of New York, in the case of *The People on the relation of Griffin and others v. The Mayor of Brooklyn*. A very able opinion was delivered by Judge *Rugles*, in favor of the constitutionality of laws of this class, in which the history of the jurisprudence relating to them is given. In the general views expressed in that opinion, we concur. In cases where the payment is made before the proprietor is expropriated from his land, (as provided in the opinion just delivered in the case of *Euphrosine street*.) there is no constitutional objection to the carrying into effect the statute under which these proceedings have been instituted.

By the original act of the incorporation of New Orleans, the mayor and city council had ample powers for the opening and widening of streets. A very simple mode of adjusting the indemnity due to the proprietors of the land required was provided, and the amount determined to be due was to be paid for out of the general funds of the city. Act of 1805, § 16 and 17.

The provisions of that act were found equal to every exigency, until the year 1832, when the process of expropriation was to be quickened, and a statute was enacted, under which the burden of paying for property required for new streets was to be laid upon those who were supposed to derive the benefit from the improvement. Under this statute, the legality of the assessments made upon the lots of the appellants must be determined; the statute is the mandate by virtue of which the power of expropriation and taxation is to be exercised. We consider, that the powers conferred by the statute are not to be enlarged by intendment: they affect the property of individuals, by subjecting the land required for public use to be taken against the will of the owner, and the proprietors of lots fronting or adjacent, to the expense and charge of paying for it. The case, and the proceedings under it, must be within the statute. We find, by the allegations of the petition of the municipality, that nothing else is

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asked than the widening of Roffignac street, between New Levee and Front street, so that it be of uniform width. The petition follows the words of the ordinance of the municipal council of the 15th of July, 1847, by virtue of which the proceedings are instituted. We have seen, that the municipality itself contests the title of *Donotan*; and we consider, that the right of use of the lots included in the report of the commissioners, as well as the right of property and the legality of the assessments for distribution, are fully at issue by the pleadings before us.

In the estimate of *Donotan's* property at \$12,000, is included the batture lot in front, which, with its riparian rights, is estimated at six thousand dollars by the first report of the commissioners. It, therefore, becomes necessary to consider the right of the commissioners to impose this assessment for the purpose of appropriating this batture lot to the public use.

On the Mississippi river, the levee along its banks, when established by municipal authority, is by law considered as the bank of the river. The use of the banks of navigable rivers is public. The use of this batture lot between the line of the levee and the stream is in the public, the property in the soil being in the adjacent proprietor. If, by the municipal authority, the levee should be advanced towards the river, and the batture brought within the dominion of private property by the extinguishment of the public use, and its subjection as to possession and use, to the will of the owner, and the space now under consideration should be required for a street, undoubtedly the municipality would have to cause the owner to be indemnified for the property. But, until this occurs, the use of the batture is in the public. There is nothing before us which shows, with anything approaching certainty, that the levee will be advanced within any reasonable time; the whole extent of the lot is only from sixty-eight to seventy-four feet from the levee to the water. It may never be increased to an extent which would justify, as a matter of good police, the removal of the levee, and may be diminished by any sudden abrasion caused by the currents of the river. If, in the judgment of those entrusted with the administration of the municipality, the public interest requires that the municipality should own this piece of batture, let the municipality buy it, and pay for it. *Henderson et al. v. The Mayor et al.*, 5 L. R. 423. At present, there has been no ordinance from the municipality, which indicates any such necessity or purpose. That under which the proceedings are had, contains nothing to that effect. The question then presents itself, whether the assessments made on the property of the several proprietors who are appellants, and the contribution which the municipality is required to make, are authorized by the statute, for the purpose of widening Roffignac street to the river. The question, we think, answers itself. The use of the space is already in the public, and there can be no assessment for opening a space which is already open, or extending a street over a batture, the use of the whole of which is public, and the right of passage over which is a consequence of the use. We therefore conclude, that the assessments made and the contribution required for the purpose of reimbursing the owner of the batture lot, are not authorized by the statute. The estimated value of the batture lot, to wit, six thousand dollars, must therefore be left entirely out of any sum which the appellants might be compelled to make up.

It is contended, by the counsel for the Charity Hospital, one of the parties appellant, that the only lots subject to assessment under the statute, are those "adjacent to and fronting that part of the street so opened, straightened or

improved;" that from the words of the act, as well as from its general tenor, the owner to whose land a new front is given or added to by the new street, are alone subject to the contribution for paying for it.

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We think, the word *adjacent* applied to lots, is synonymous with the word *contiguous*. C. C. 683. In another and more general relation, it might have a more extended meaning; but in the sense in which it is used, to wit, to discriminate as to locality from other lots, we can only give this meaning to it in a statute like this, which undertakes to divest a right of property, and is consequently subjected to strict rules of interpretation.

The act does not provide, that all the property to be benefited by the improvement shall contribute to pay for it; it commits no such power of discriminating between the lots deriving a benefit and those which derive none. It does not give to the discretion of the commissioners, the whole range of the neighborhood, in selecting property to be assessed. It evidently limits the contribution to lots having a certain location, undoubtedly, for the purpose of preventing too great an exercise of a discretionary power on the part of the commissioners; and that location is, by the statute, confined to the lots and premises adjacent to and fronting that part of the street so opened, straightened or improved. Within that location, the judgment of the commissioners is to be exercised in fixing the contribution of each lot. The advantage and benefit upon which the commissioners are to act, ought not to be speculative and distant, depending on remote and uncertain contingencies, but should be substantial, certain, and to be realized within a reasonable and convenient time. 3 Wendell, 453, *Matter of Fourth Avenue*.

The statute requiring the contribution to be confined to the lots or premises adjacent to the improvement, and the terms made use of being plain, and presenting no question of verbal criticism, we can hold no property subject to assessment, which is at a greater distance from the space taken for the public use than the front line of a lot of sixty-five feet, about the size of lots in which the city was originally laid out. The adjacent lots within this distance and the lots opposite, to the same extent, will be the only lots subject to contribution, according to the only proper construction, which, we think, the statute will bear. This mode confines the assessment to the lots in the same square or islet; whether it is to be extended to another square, it is not necessary to determine; a case might occur in which it might be so extended. We are of opinion, that the only lots which would be bound to contribute for the lot between Front street and New Levee, are those fronting and adjacent to that part of the street to be opened, to wit, the lot of *Grass*, and sixty-five feet of land adjacent to *Donovan's* lot, on Roffignac street, and the lots to the same extent of front on the opposite side of the street. The statute gives no warrant for burthening any other property in the neighborhood with this expense. We have fixed upon this distance of sixty-five feet, because that dimension is the largest front of what may be denominated a full lot in New Orleans, and is as just a standard as we can think of.

The litigation in relation to the opening of this street, according to our reports, dates back as far as 1838. 12 L. R. 305. The present proceedings were instituted in 1847. On the 24th of March, 1849, *Donovan* made an abandonment of his lot, with the batture, at the appraised value of twelve thousand dollars. This abandonment appears to have been made by a formal instrument filed with the proceedings. It was not accepted by the municipality, and the district judge determined that it was filed too late to take effect under the statute. It is clear,

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that the abandonment was not made within the time required by the fifth section of the statute; and we find no provision made for an abandonment of the property by the owner, unless it be considered authorized under that section, or the preceding section, which presupposes the consent of the municipality to be given. We regret, that it is not in our power to afford relief to *Donovan*, by enforcing the abandonment of his property, and the payment to him of its estimated value. During this litigation, the enjoyment of his rights to his property had been suspended by the proceedings instituted by the municipality, which have resulted in nothing but injury to him, and without any fault of his. His case constitutes a strong claim upon the justice of the corporation, which, we hope, will not be overlooked, or longer deferred.

The judgment of the district court is therefore reversed, except that part of said judgment which decrees the lot on Front street to belong to *Donovan*, and that said lot is not dedicated to public use, which is affirmed. The case is remanded for further proceedings, according to the rules settled in this opinion; the municipality paying costs in both courts. •

SLIDELL, J. My views upon a portion of the subject considered in this case, are stated in the case of the *Opening of Euphrosine Street*, to which I refer.

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### LIZA, c. w. v. DR. PUISSANT et al.

The temporary residence of a slave, even with the consent of the master, in a foreign country, does not entitle the slave to freedom after his voluntary return with the master to a State where slavery exists.

APPEAL from the First District Court of New Orleans, *Larue, J. J. C. David*, for plaintiff. *Janin and Taylor*, for defendants. The judgment of the court was pronounced by

ROST, J. The plaintiff was born the slave of the late *Hardy De Boisblanc*. In 1821, *Boisblanc* went to Bordeaux, where his family were then sojourning, for the purpose of bringing them back to Louisiana. He took with him to Europe, for their education, *Mrs. Puissant* and her sister, *Mrs. Sauv *, who were under ten years of age, and the plaintiff, then twelve years old, went with them as a servant. *Mr. Boisblanc* remained two or three months in Bordeaux, and then sailed for Louisiana with his family and the plaintiff, who remained with him as a slave. She was given to the defendant, *Mrs. Puissant*, at the time of her marriage, about twenty years ago, and has continued in her service ever since. She has had seven children since her return from Europe. She alleges, that she became free by putting her foot upon French soil, and claims her freedom and that of her children, together with damages, since the defendant was apprised of her rights. There was judgment against her, and she appealed.

This case is similar to that of *Bernard Conant, Tutor, v. Guesnard and Wife*, 5th Ann. 696. The only difference between the two being, that the plaintiff was taken to France before the passage of the act of 1846. Had there been no such statute, the opinion clearly intimates, that the decision would have been the same, on the ground, that the owner of the slave never intended that she should reside in France, but took her merely as a servant during the voyage, with the intention to send her back to Louisiana, which intention she carried

out within a reasonable time. That case, as well as the present, came fairly within the exception in the case of *Arsene v. Pignéguy*, 2d Ann. 621.

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The district judge, in his opinion, comments as follows upon the evidence in the record: "*Boisblanc* did not go to France to establish a domicile. He did not go there to reside any length of time. He went for a specific purpose, to bring back his wife to Louisiana, and appears to have remained at Bordeaux for as short a time as the nature of the intercourse between that city and this, thirty years ago, would permit. The circumstances of the case would rather seem to bring it within the rule applicable to those who are passing through a foreign country on a lawful journey." See the case of *Arsene v. Pignéguy*.

We concur fully in these views, and are satisfied, that even if *Arsene's* case was taken as the rule of our decision, we could not interfere with the judgment. Whether we would follow that precedent in all cases which occurred before the passage of the act of 1846, it is unnecessary to say. The principle, that the temporary residence of a slave in a country in which slavery is not tolerated, does not, of itself, work such a permanent change in his *status* as to make him free after his voluntary return to the domicile of his master, by the laws of which slavery exist, is supported by high authority. Case of slave *Grace*, 2d Haggard's Admiralty R. 94 *Commonwealth of Mass. v. Aves*, 18 Pickering, 193. Story Conflict of Laws, No. 96. *Strader et al. v. Graham*, 10 Howard, 82.

The judgment is affirmed, with costs.

EUSTIS, C. J. The petition bases the right of freedom asserted, on the fact of the petitioner having been in France in the year 1821; it charges, that by putting her foot on the soil of France, she immediately became free. It is proved, in this case, that it was never the intention of the family that *Liza* should be left in France, but she was to return immediately to Louisiana; which she did with *Mr. Boisblanc* and his family. I concur with the district judge, in considering the slave as accompanying persons in their service on a lawful journey. There was an evident propriety, little short of necessity, in the children being accompanied by a female servant on board the ship, in the absence of a female relative, and it is not alleged or proved, that there was any delay in returning the slave to her home, according to the original purpose, when her services were no longer needed. So that the question of law involved in the case may be considered as well stated in the petition. There is a case in which an opinion was expressed, that the presence of a female slave in France, with the consent of the master, creates, *per se*, the condition of freedom, so that her return to Louisiana does not subject her to servitude; I feel it to be my duty to state my reasons for dissenting from the opinion expressed in that case. It is the case of *Marie Louise v. Marot*, 9th L. R. 475, decided in May, 1836. The court there say, the plaintiff being free for one moment in France, it was not in the power of her former owner to reduce her again to slavery. That this is true, in France, there can be no question; the law of France recognizes no such relation as that of master and slave. But I do not concur in the opinion, that on the voluntary return of the slave to the country of his domicile, from one in which slavery does not exist, the dominion of the master can in no case be exercised. There is another case, *Smith v. Smith*, 13 L. R. 445, in which the principle decided in the previous case is affirmed, although the facts of the case presented other grounds on which the decision could be made. I concurred in the judgment in that case, and I think the case was well decided for the plaintiff; but I am satisfied, that it was an

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error to place it on the reasons given in the opinion of the court by Judge Martin. *Mrs. Smith*, the mistress, had left Louisiana for France. She took with her the female slave, who was the plaintiff. She had remained in France, and there was no intention on her part to return to Louisiana. Her residence was there, and she endeavored to retain the plaintiff with her in France. The absence of the defendant, from its origin, had a character of permanency, and the plaintiff's removal from Louisiana, so far as the intentions of the defendant could be reached in the evidence, was with the same purpose. The case of *Thomas, f. m. c. v. Generes*, 16 L. R. 483, is, as to the facts, like that just cited.

In all the cases of this kind which have been decided in this court, we have avoided anything which could be considered as an affirmation of the principle laid down in the case of *Marot*. The first case that came before us, was that of *Josephine v. Poultney*, 1st Ann. 328. In that case, the defendant had removed from Louisiana to Philadelphia with her slave, who was the plaintiff, and had resided for years there, and by virtue of this residence, we held her released from the dominion of her mistress, which did not revert on the removal of both to this State. The decision was based on the effect of the acquired residence in Philadelphia, on the condition of the plaintiff.

In the case of *Eugenie v. Préval*, 2d Ann. 180, the plaintiff had been taken to France by his daughter, who was married to a French officer, in whose service she remained for years. We said, "this case is nearly the same with that decided in June last, of *Josephine v. Poultney*, in which we held, that the status of freedom was acquired, not by having been in a country in which slavery did not exist, but by a residence and domicile there." In the case of *Arsene v. Pignéguy*, 2d Ann. 621, the plaintiff had been taken to France, and remained there in the service of the family of her master, for the space of two years. We considered the condition of the plaintiff as changed by her remaining in France for such a length of time. In that case, we distinctly stated what we considered as exceptions to the rule in *Marot's* case, which we thought was too general in its terms. We stated, as exceptions, the cases of persons thrown on foreign coasts by shipwreck, taking refuge from pirates, driven by some overwhelming necessity, or perhaps those passing through a foreign territory, on a lawful journey.

By the statute of 1846, no slave can be entitled to his freedom in this State, by having been with or without the consent of his master, in a country where slavery does not exist. No questions of this kind can occur in relation to any rights asserted by slaves subsequent to this statute, which are covered by its operation. The jurisprudence, independent of that statute, has been far from being settled on principles on which questions of this gravity ought to have rested. The opinion in *Marot's* case, seems to have been adopted from precedents, and there does not appear to have been any consideration of those exceptions which must obviously exist to the rule. For instance, the case of the fugitive slave. So far as the rights of his master are concerned, they are equally protected, wherever the fugitive may be. Our courts must hold, that the possession of the master continues, notwithstanding the flight of the slave. *Oates v. Caffin*, 3d Ann. 341. Pothier, *Treaties on Possession*, sec. 89.

This is not the only rule relating to the conflict of laws which presents, in its practical results, more exceptions than examples under it; and which, consequently, affords a most unsafe guide in the administration of justice. Has it



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ever been supposed, that a father in Spain, where the age of majority is twenty-five, loses the paternal power over his son over the age of twenty-one, by the latter's temporarily sojourning in England or crossing the frontier of France, where the age of majority is twenty-one? And that on his return to his country, being still of the age of minority, the minor is emancipated, and can no longer be held subject to the paternal authority? And that this change in his condition is wrought by his accidental presence in a land, where, by its laws, he would be held to be *sui juris*? A distinction is made between slavery and other domestic relations, because it is said that slavery is contrary to the law of nature and the creature of municipal law. But what law of nature fixes the age of majority at twenty-one or twenty-five? Rutherford's Institutes, lib. 1, c. 11, sec. 8. *Jus autem potestatis, quod in liberos habemus, proprium est civium Romanorum: nulli enim alii sunt homines, qui talem in liberos habeant potestatem, qualem nos habemus.* Inst., lib. 1, tit. 9, s. 2. The sacred relation of marriage itself is an institution of municipal law, recognized as is that of slavery, by the law of nations. *Iustas autem nuptias inter se contrahunt cives Romani qui secundum præcepta legum cõunt.* Inst. lib. 1, tit. 10. So far as foreign laws have effect upon the *status* of persons, their domestic relations must, necessarily, all be upon the same footing.

The authorities cited in the opinion of Judge Rost, are in direct opposition to the decision in *Marot's* case. The case of *Strader v. Graham*, 10 Howard, 82, was an appeal taken by writ of error from the Court of Appeals of Kentucky. It was not decided on its merits in the Supreme Court of the United States, but went off on a question of jurisdiction. In that case, certain slaves, who were musicians, had gone from Kentucky across the river to Ohio, on more than one occasion, with the permission of their master, to perform at public entertainments. The courts of Kentucky held, that they did not acquire their freedom by this temporary presence in a State where slavery was prohibited. This is the only practical doctrine which can be maintained in a State whose frontier, for hundreds of miles, is bounded by free States, where the communication is open, and the intercourse between the inhabitants constant and uninterrupted. It rests with each State to establish and regulate the domestic relations of its inhabitants. A State may prohibit slavery within its limits, may abolish the paternal power; but this imposes no obligation on other States to hold the condition of persons domiciled there, as extinguished by reason of a presence in the State in which the relation is not recognized. This court has held the *status* of a slave to be changed by a residence in a country in which slavery did not exist, when the residence, with the consent of the master, had a character of permanency, but not that the *status* was affected by a transit for a temporary purpose. Cases of this kind, resting mainly on the intention of parties, are attended with great difficulties in their solution; but in this respect, they resemble all cases of contested or questionable domicil.

For these reasons, I think the judgment of the district court ought to be affirmed.

### THE STATE v. ABRAHAM PARKER.

A party introducing a witness to impeach the testimony of another witness, is not restricted to the simple inquiry as "to the general character of the witness for truth and veracity;" he may inquire into the general character of the witness, whose testimony is sought to be

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| 44  | 984 |
| 7   | 83  |
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| 7   | 83  |
| 46  | 887 |
| 7   | 85  |
| 50  | 336 |
| 7   | 88  |
| 108 | 0   |
| 7   | 88  |
| 108 | 238 |

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f118 102  
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120 131  
e120 133

impeached, but cannot inquire into any *particular acts* of an immoral character which may have been committed by the impeached witness.

A person accused of crime, may prove in his defence his general good character, and also his character as to such moral qualities as have pertinence to the charge.

**A** PPEAL from the First District Court of New Orleans, *Larue, J. Isaac Johnson*, Attorney General, for the State. *Randall Hunt, J. R. Grymes, and J. B. Robertson*, for the appellant. The judges delivering their opinions separately. The judgment of the court was pronounced by

PRESTON, J. The accused was prosecuted for the murder of *Eliza Phillips*, was convicted of manslaughter, and has appealed from the judgment against him. He has brought the case before us, on a bill of exceptions to evidence offered and received against him, and two bills of exceptions to the rejection of evidence offered in his favor.

The district attorney offered, in evidence on the trial, the coroner's inquest; and it was admitted, the court instructing the jury, at the time, that this evidence must be restricted by them, to the proof of the death of the deceased, and that they could not regard it any further. The counsel of the prisoner excepted.

By law, the coroner, with a jury of freeholders, is directed to hold an inquest on the body of a person found dead, and the cause of whose death shall be unknown, to ascertain, by the examination of the body and of the wounds, in what manner the person has come to his death; and in order to ascertain the cause of the death, with all the certainty possible, the coroner and jury are authorized to require, at the public expense, the services of physicians, to give their opinion on the subject; and it is expressly declared, that the inquest, signed by the coroner and members of the jury, shall be sent to the clerk's office, to be a record of the facts to be used before the grand jury, in case a prosecution takes place; and, if the jury finds a person guilty of the death of the person found dead, the coroner is required to cause him to be arrested. The inquest is, therefore, a very solemn public proceeding, prescribed by law, principally for two objects: 1st, To ascertain the physical facts as to the death of the deceased. 2nd, To institute a public prosecution against the supposed perpetrator of the deed.

The direction of the statute, that the coroner's inquest is to be used as evidence before the grand jury, is not an exclusion of its use before the petty jury, because most of the evidence proper for the grand jury, is legal evidence, also, before the petty jury.

That part of the inquest which ascertains the death of a person and its precise causes, establishes mere physical facts, which are to be ascertained, according to law, for public purposes. A record of those facts made at the time, and upon inspection by a public officer and intelligent men, aided by professional skill, is better and more precise evidence of those facts, than proof from the fleeting recollections of men, or the hasty and heedless observation of passers by. Every one feels, that it is more satisfactory proof than any other that could be offered. The facts, in themselves, are evidence of neither guilt nor innocence, and have no direct tendency to implicate the accused, nor any one else. There can be no evil resulting from the admission of the record of those facts in evidence, as it can be controverted by the accused, if material to his defence, and the more conclusively, as from the time of holding the inquest, he has cognizance of them. There can be, therefore, no reasonable objection to this mode of ascertaining the physical facts, which caused the death, before the petty jury. Evidence is that which tends to convince the mind of a fact, and whatever is true and has that effect, should be received, unless rejected for some reasonable cause.

From authority, also, we should conclude, that inquests, as to matters of public and general concern, were evidence of those matters in England. 1st Greenleaf, sections 515, 556. 4 Black. Com. The ancient rules of the common law were much relaxed by statutes on this subject. McNally on Evidence, 285.

Our Constitution, however, provides that a person accused of a crime, shall have the right of meeting the witnesses face to face. Therefore, that part of the coroner's inquest, which tends to trace the death to a person accused of the deed, is not evidence on the trial, because it tends to show guilt in him, to the exclusion of others; and, therefore, he has the constitutional right of meeting the witnesses face to face. The deposition of the witnesses before the inquest, if taken in writing, should not, therefore, be given in evidence on the trial, much less should the opinion of the coroner and jury of inquest, given as the foundation of an order of arrest, that the death was caused by the accused.

The inquest, in the present case, contained the opinion that the accused fired the pistol which caused the death of the deceased, and that part of it should not have been read, or given to the jury. But as the court cautioned the jury, that no part of the inquest should have any influence upon their minds, except that which established the death, we do not feel ourselves authorized to reverse the judgment for such an irregularity, considering the caution of the court, with which it was accompanied. Men would be unfit to sit upon the trial of their fellow men for crimes, if they were incapable of discriminating, as directed by the court, between that part of the document which was evidence, and that which was not; and, if such were the case, the trial by jury would be unworthy to be regarded as the bulwark of liberty. In point of fact, jurymen are capable of making the discrimination, and there is no reason for deluding ourselves with the contrary supposition.

In the progress of the trial, the counsel of the accused took the following bill of exceptions: "Be it known, that, on the trial of this cause, the defendant offered to prove, by *H. Rowl*, *Mary Owens*, and other witnesses present in court, and one of whom was sworn and questioned thereto: 1st. That *Eugene Suchet*, the principal witness for the prosecution, is a man of infamous character, notoriously guilty of acting falsely and fraudulently, of extorting money, by force and cheating, from the unwary and feeble, and of living among low and abandoned women. 2d. That he is idle, dissolute and profligate; had no means of support, and no mode of obtaining money than those just set forth. 3d. That although these witnesses cannot say that he has formed any character as to a lack of truth, and is false in oaths and words, yet, from his vices and general bad character, they swear that he is unworthy of credit, and they cannot believe him on oath. To this testimony, and to the interrogatories propounded thereto, the district attorney objected; and the judge sustained the objection, and rejected the evidence. To this ruling of the court the defendant excepted, and now tenders this his bill of exception.

*By the Court.*—The judge, in this decision, believed himself to be bound by the common law of England. He admitted all proof as to the general reputation of the witness, as to truth and veracity, but did not feel justified, under the law, in going farther. J. C. LARUE, Judge."

We must take it for granted, for the purpose of this decision, that the witnesses would have given to the witness impeached, the character stated in the bill of exceptions; and, if so, it would certainly have proved him a man of bad general reputation. The question would seem, then, to be, whether the evidence offered was as to general character, or to particular charges.

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The accused did not offer to establish any particular offence or criminal act against the witness, but that he was an infamous character; that he was addicted to crimes, which indicated a total disregard of truth, without specifying a particular crime committed by him; that he lived among low and abandoned women; that he was idle, dissolute and profligate; that he had no means of support, but what he obtained by the crimes and vices mentioned; and that, from his vices and general bad character, he was unworthy of credit, and the witnesses would not believe him on oath. These appear, to me, general descriptions of a bad character, without entering into particular facts or charges; and that the court limited the testimony, as to the general character of the impeached witness, to his character for truth and veracity alone; and that the court felt bound to such a limitation, by the rules of evidence at common law.

There is no doubt, that the tendency of many English decisions, and the opinions of some elementary writers, is to establish that limitation. Thus, Roscoe and Phillips give the very questions to be asked in impeaching a witness, limiting them to the means of knowing the general character of the witness impeached, and to the inquiry, if the witness, from that general character, would believe him on oath; and some judges have limited the questions to a knowledge of the general character of the witness, for truth and veracity. We are inclined to the opinion, however, that the weight of authority is in favor of testimony as to the general bad character, without limiting the questions as to character for truth and veracity, or establishing any formal interrogatories. Thus, Mr. Archbold, probably the most accurate elementary writer on criminal law, informs us, that the credibility of a witness is compounded, among other things, of his integrity and of his veracity, devoting a paragraph to each quality. If, therefore, his integrity tends to establish his credit, his want of integrity should go to his discredit; and, in fact, this author says, the commission of all offences which import falsity or fraud, whether followed up by conviction or not, affects the credit of the witness; and he expressly says, witnesses may be examined as to the general character of the witness impeached, and does not confine their examination to the general character for truth and veracity. P. 143.

Conceding, however, such strict limitations, well established at common law, we do not feel absolutely bound by them. The act of 1805, to which, no doubt, the district judge referred, as binding him by that common law, is as follows: "The rules of evidence, and all other proceedings whatsoever, in the prosecutions of crimes, offences and misdemeanors, changing what ought to be changed, shall be according to the common law."

The ancient rules of evidence are therefore subject to change, where it is indispensable to truth and justice. We doubt if the rules of evidence in England, are precisely the same now which they were in 1805. The whole tendency of modern decisions is to relax the strict rules of evidence, with a view to lay everything before courts and juries, which ought to have an influence upon the cases before them, and to leave the objections, as much as possible, consistently with an orderly and speedy administration of justice, to the credit of the testimony and witnesses.

Now, all will agree, that a man, proved by reputable testimony to possess the character described in the bill of exceptions under consideration, would not be entitled to equal credit with a pure and virtuous witness; yet such a man, unless the proof is allowed, would stand as fair before the jury, as one of the most spotless character. And this would often occur in fact, as well as in theory. For those conversant in criminal trials, know by experience, that a wretch

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selected as a witness, either to criminate or acquit by perjury, is always selected on account of his fair face, smooth tongue, and affected sincerity, for the express purpose of more effectually passing off falsehood. The great art of such a witness, is to lie like truth; and he is always selected from the class of men possessing the character described in the bill of exceptions. We were therefore, in a civil case in the Western District, not reported, induced to consider favorably the views of the Supreme Court of the State of Kentucky, in the case of *Hume v. Scott*, 3d Marshall's R. 261, 262; and I will transcribe and adopt them as my views in the present case.

"Every person conversant with human nature, must be sensible of the kindred nature of the vices to which it is addicted. So true is this, that to ascertain the existence of one vice of a particular character, is frequently to prove the existence of more at the same time in the same individual. Add to this, that persons of infamous character may, and do frequently exist, who have formed no character as to their lack of truth, and society may have never had the opportunity of ascertaining that they are false in their words or oaths. At the same time, they may be notoriously guilty of acting falsehood in frauds, forgeries and other crimes, as would leave no doubt of their being capable of speaking and swearing it, especially as they may frequently depose falsehood with greater security against detection, than in the practice of those vices. In such cases, and with such characters, ought the jury to be precluded from drawing inferences unfavorable to their truth as witnesses, by excluding their general turpitude? By the character of every individual, that is, by the estimation in which he is held in the society or neighborhood where he is conversant, his word and his oath is estimated. If that is free from imputation, his testimony weighs well; if it is sullied, in the same proportion his word will be doubted. We conceive it perfectly safe, and most conducive to the purposes of justice, to trust the jury with a full knowledge of the standing of a witness into whose character an inquiry is made. It will not thence follow, that from minor vices, they will draw the conclusion in every instance, that his oath must be discredited, but only be put upon their guard, to scrutinize his statements more strictly, while in cases of vile reputation in other respects, they would be warranted in disbelieving him, though he had never been called so often to the book, as to fix upon him the reputation of a liar when on oath."

But, in applying the principles of this decision to the case before us, I do not consider that particular acts of misconduct may be proved, or wish to be understood as holding, that the district courts must admit crimination and recrimination, further than the real purposes of justice require, and is consistent with the good order of the court and the speedy administration of justice; much must necessarily be left to the discretion of the courts of original jurisdiction, in these respects.

For these reasons, I am of opinion that the court should have admitted evidence that the witness was a man of infamous character; that he had notoriously the character of acting falsely and fraudulently, of extorting money by force and cheating from the unwary and feeble, and of living among low and abandoned women; that he was idle, dissolute and profligate, and supported himself by obtaining money by the means set forth; and that from his vices and general bad character, he was unworthy of credit, and not to be believed on oath.

The accused has brought the case before us on another bill of exceptions. He introduced several witnesses to prove his character and conduct, and after show-

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ing that he was a man of good character for peace and quiet, offered to show, that he was of a mild disposition, and one of the last men who would willingly shed a woman's blood; that he was a kind and affectionate husband and father, honest and industrious, of strict integrity and pure morals. The district attorney objected to any evidence being received as to the character of the accused, except to show that he bore a good character for peace and quietness. The court sustained the objection, and restricted the accused to these general questions: Do you know the character of the accused for peace and quietness? Is it good or bad? and restricted the witnesses to categorical answers thereto.

The decision is in conflict with that in the case of *The King v. Brecknock*, in which the prisoner accused of murder, proved his good character, and that his witness believed he was the last man in the world who would have a thirst of blood, and was allowed, in opposition to the objection and argument of the attorney general of England, to prove particular instances to support his belief. So, in the case of a man tried for a riot, in 1780; he proved his good character, and the witness proceeding to give as his reason for entertaining a good opinion of him, that he knew him to be a dutiful son, and that he supported a helpless parent by his industry; the evidence was objected to, but ruled to be proper evidence by the Chief Justice, and Gould, Justice, on the ground, that when a witness is called to support a man's character, he may not only give the prisoner a good character, but he may give his reasons for entertaining a good opinion of him. And in the capital case of *The King v. Thelwell*, Lord Kenyon promulgated the same principle in saying, that affectionate and warm evidences of character, when collected together, should make a strong impression in favor of a prisoner; and when those who give such character in evidence are entitled to credit, their testimony should have great weight with the jury. McNally on Evidence, 322, 323.

It is true, that Wharton and Archbold lay down the rule, that the prisoner can give in evidence only his general character; and Roscoe confines the inquiry as to his general character, having some analogy and reference to the charge against him. Page 72. And perhaps this is the key to the whole controversy. The nature of his general character or good acts which the accused offers to prove, should have a bearing upon the charge against him. Thus, in the prosecution of *Horn Tooke* for a libel, he was allowed to give in evidence, a book published by him twelve years before, with a view to show, that the object of his publications for which he was prosecuted, was only parliamentary reform.

At all events, I do not find the decisions in favor of admitting particular facts in evidence, as reasons of the witness for testifying to the good character of the prisoner overruled, and it appears to me so reasonable and humane, that I cannot think it inconsistent with the rules of evidence. The effort to avoid collateral issues seems, sometimes, to have excluded from the jury box, what every jurymen would wish to learn, and to have trenched closely upon the principles of humanity. It is but the just reward of many good actions, that they should be of some avail to a man in his utmost need, especially when, by invoking their aid, he throws himself open to all the opprobrium that can be cast upon him by the character he has acquired by his evil deeds.

I think we are justified by authority and reason too, in coming to the conclusion, that the evidence offered by the accused should have been received.

The judgment of the district court is reversed, and the cause remanded for a new trial, according to law.

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SLIDELL, J. 1st. Upon the first bill of exceptions, I think the ruling of the district judge was too narrow. He confined the party impeaching the witness who had testified against him, to proof of the general reputation of the witness as to truth and veracity. In my opinion, the prisoner should have been allowed to offer general evidence, as to the general character of the witness impeached. The State would then be allowed to inquire into the means of knowledge of the witness so testifying. I think it proper, however, to add, that in my opinion, the district judge was right in excluding inquiry, on the part of the prisoner, as to any particular immoral conduct on the part of the impeached witness. See the *People v. Mather*, 4 Wendell, 258. *Bakeman v. Rose*, 14 Wendell, 110. Peake, 197. 3 Hill, 178. One very good reason for thus limiting the inquiry to general character, and not permitting it to run into particular acts and collateral facts is, that an opposite course would embarrass and delay trials to a degree that might render the administration of justice impracticable. In adopting rules in matters of this sort, they must be considered, not in the mere abstract, but with reference to their practical working in the administration of justice.

2d. Upon the second bill of exceptions, I am of opinion, that the ruling of the district judge was too narrow. It confined the prisoner to proof of his character for peace and quietness. I think he had a right to offer evidence as to his general character, and that in doing so, he should be permitted to show his character as to such particular moral qualities as have pertinence to the charges for which he is under trial. See 2 Massachusetts, 317. Roscoe, 72, &c.

EUSTIS, C. J. I concur in this opinion.

ROSE, J. I concur in this opinion.

### GEORGE D. SHADBURNE et al. v. WILLIAM AMONETT, Executor.

Donations between married persons, made during the marriage, are revocable at the will of the donor.

It is better for parties to vindicate their rights of property under their own names, and not under the cover of simulated titles.

**A**PPEAL from the District Court of Madison, *J. N. T. Richardson, J. Stacy and Sparrow*, and *A. Snyder*, for plaintiffs. *Stockton and Steele*, and *J. J. Amonett*, for defendants. The judgment of the court was pronounced by

EUSTIS, C. J. In June, 1845, an execution was taken out on a judgment rendered in the suit of *Silas Lillard v. David Stanbrough*, and the sheriff seized certain lands in the parish of Madison. The present suit is a third opposition made to the sheriff's sale, by *George D. Shadburne* and *Sybil Stanbrough*, his wife, claiming, as the property of the wife, these lands thus seized, as the property of *Stanbrough*, the judgment debtor. There was a judgment in the district court, by which the opposition was sustained, and *Sybil Stanbrough*, the wife of *Shadburne*, was adjudged to be the owner of the lands seized, and quieted in her title and possession thereof. This judgment was rendered on the verdict of a jury. The representative of the original plaintiff in execution has appealed.

The petition alleges, that *Sybil Stanbrough* is the owner of the lands, by virtue of a donation made to her on the 14th of January, 1847, by *Robert M.*

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*Scott*, by authentic act passed before the recorder of the parish of Madison; that *Robert M. Scott* acquired title to the lands, by purchase at sheriff's sale, made on the 1st of August, 1846, under an execution against *Stanbrough*, issued on a judgment rendered against him in favor of *J. C. Garthwaite*, in the parish of Concordia, which judgment was recorded in the parish of Madison, in 1839; that under said donation from *Scott*, the plaintiffs have been in possession of the lands since the date thereof, and that since the sheriff's sale to *Scott*, *Stanbrough* has had no interest in or title to the lands.

The answer charges, that the sale to *Scott*, and the donation, were mere contrivances to defeat the rights of the creditors of *Stanbrough*, who is insolvent, were simulated, and are null and void; that the judgment under which the sheriff's sale was made to *Scott* really belonged to *Stanbrough* himself, and was kept alive and used for his sole benefit; that *Stanbrough* has always been in possession of the lands, which remained unchanged by the transfers on which the suit is based, etc.

A verdict on issues of this kind ought not to be disturbed, except for grave reasons, and on the strongest convictions on the part of the court of its illegality, and a scrutiny of the evidence adduced on the trial becomes necessary.

It appears by the testimony of *Scott*, that he bought the lands at the sheriff's sale for and on account of *Shadburne*; that he paid no money for them, gave no security for the price; that he held the lands in his name at the request of *Shadburne*; and that the object of *Shadburne*, in putting the lands in his name, was to avoid the effect of a judgment then existing against him as the surety of one *Shannon*. He made the donation to *Mrs. Shadburne*, at the instance of her husband. She is the neice of *Stanbrough*, the judgment debtor. It results, from this testimony, that, in point of fact, the donation of the lands was from the husband during their marriage, and consequently recoverable at the will of the husband. C. C. 1742.

It is not attempted to infringe, in the slightest degree, on the credit of this witness. It is conceded, that his testimony reveals the truth. There was really no donation, in its proper sense, from *Scott*, nor any motive or reason for one to *Mrs. Shadburne*. The purchase at sheriff's sale, by him, was a mere simulation; he never considered himself thereby the owner of the land. It was in his name, for a particular purpose, which he discloses; and it is almost a necessary conclusion, that the transfer to the wife, at the instance of the husband, was in furtherance of the original object, to avoid subjecting the lands to seizure under the judgment against *Shadburne*. *Scott* never took possession of the lands, nor is any act of ownership by him or *Mr. Shadburne* shown to have been exercised. It is impossible to consider this donation of the lands as a *bond fide* act translatif of the property to *Mrs. Shadburne*.

The sheriff's sale, and the act of donation, are the titles declared upon in the plaintiff's petition; none other are mentioned. The claims of *Mrs. Shadburne* alone, are stated in the petition, and the judgment is asked for her benefit, and is in accordance with the prayer of the petition. The husband is a party to the suit; but he must be considered as a party, for the purpose of assisting his wife, and not as a plaintiff, for he sets forth no title and asks nothing from the court.

It is contended, that *Mrs. Shadburne* can avail herself of the title of her husband, and that this title is supported by the verdict. We will examine this title, observing, that it is better for parties to vindicate their rights of property under their own names, and in their own persons, and not under the cover of simulated titles. We have, on more than one occasion, discountenanced attempts



of this kind, as they embarrass the lawful pursuit of creditors and increase the difficulties of litigation; and as nothing but truth ought to have place in the administration of justice, nothing short of necessity, in the furtherance of justice, would authorize a tribunal to give effect to a simulated title.

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We have stated, that neither *Scott* nor *Mrs. Shadburne* took possession of the lands. The same is true with regard to *Stanbrough*; and we do not find the original possession of the lands by *Stanbrough*, as affected by an act of any adverse ownership, or in any respect changed. It is proved, that *Stanbrough* cultivated a part of the lands in 1848; and it is not proved that they were rated on the tax list in the name of any other than the original owner. Supposing the title of *Shadburne* to be only in issue, what is its validity, wanting, as it does, the element of possession? The allegations of the defendant are in effect, that *Stanbrough* himself bought the judgment under which *Scott* purchased the lands at sheriff's sale, and it was held in the name of another for the purpose of being used for his, *Stanbrough's*, benefit in defeating the judgment of *Lillard* against him, the latter being posterior in date to the former. The main evidence in support of these allegations is composed of the testimony of witnesses taken under commissions, of which, as well as of the documentary evidence, we have as ample means of judging as the jury had.

The relations between *Shadburne* and *Stanbrough* require some notice; not that, of themselves, they would be of any weight one way or the other, but their concurrence with the hypothesis of the defence, rather supports it than otherwise. *Shadburne* had been, for several years, the family physician of *Stanbrough*, and had married his niece. In June, 1845, an execution was issued on this *Lillard* judgment against *Stanbrough*, at whose instance proceedings under it were enjoined on the ground, that he, *Stanbrough*, had purchased the judgment at sheriff's sale, made in February, 1844, and that thereby the judgment debt had become extinguished. This identical ground is stated in the plaintiff's petition, as one of the means for defeating the seizure and sale of the lands in dispute, to which the present opposition is made. And the question is asked, and has not been answered, as to what right or interest the plaintiffs had in attacking the regularity of the defendant's proceedings in execution, which was a matter exclusively between the creditor and the judgment debtor. If the lands in dispute belonged to the plaintiff, *Mrs. Shadburne*, her opposition to the seizure of them must prevail; and she can have no interest in setting aside the proceedings in execution, which can only reach the lands of the judgment debtor, and not hers.

It appears, that *Stanbrough*, in obtaining his injunction staying proceedings on the *Lillard* judgment, had not given an injunction bond with security, and on the 21st of November, 1845, an order of court was made requiring him to give security. On his failing to comply with this order, his injunction was dismissed, with ten per cent damages and costs, by judgment of the court rendered on the 28th of the same month, November, 1845. We find, on the 24th of this month, *Shadburne* addressed a letter to *Garthwaite*, in New Orleans, proposing to purchase his judgment against *Stanbrough*, and offering him four hundred dollars for it. On the 10th of January, 1846, *Garthwaite* wrote to *Shadburne*, from Newark, New Jersey, referring him to *Mr. William Alling*, of New Orleans, who had full authority to close the matter, and to assign the judgment to the purchaser. Early in February of that year, *Shadburne* presented an open letter from *Stanbrough* to his commission merchant in New Orleans, requesting him to aid *Shadburne* in buying a judgment, and that he was refer-

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red to *Mr. William Alling* for that purpose. On this request, he paid *Shadburne* four hundred dollars, which he charged to *Stanbrough*, and the latter repaid him. The transfer of the judgment bears date Newark, New Jersey, January 10, 1846, and is filled up in the name of *Shadburne*, but was received in blank by *Mr. Alling*, and was by him delivered to the person receiving it, on his paying the sum of four hundred dollars. A feeble attempt was made to weaken the effect of these facts, by showing that *Shadburne* had not been paid for several years' services as the family physician of *Stanbrough*, and thereby to establish that the four hundred dollars was on that account. The evidence on this point is far from being definite or satisfactory; and we consider, that it is clearly proved that the money of *Stanbrough* paid for this judgment, and that the purchase was made by *Shadburne*, for his benefit. This being the case, we find a proper motive for *Shadburne's* placing the judgment in the names of others, so that it might be used for the original purpose of aiding *Stanbrough* in defeating the execution on the *Lillard* judgment, without any interference from his, *Shadburne's*, creditors.

Having come to these conclusions, on a careful consideration of the evidence, we are bound to give the defendant the benefit of them, and to hold the lands, which are the subject of the present suit, liable to execution as the property of the judgment debtor, *David Stanbrough*.

The judgment of the district court is therefore reversed, and judgment is rendered against *George Shadburne* and *Sybil Shadburne*, his wife, on the opposition to the seizure and sale of the lands seized by the sheriff; with costs in both courts.

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### ELIZA JANE WEBB v. ELEAZAR PEET et al.

Property purchased during the marriage by either husband or wife, is presumed to be liable for community debts, unless the contrary be shown. C. C. 2371.

Where a creditor of the husband seizes property as liable for community debts, which the wife claims as having been acquired by her after a judgment of separation of property between herself and husband, it is incumbent upon her to show, affirmatively, the reality and good faith of the judgment of separation, if the creditor attacks it upon the ground of fraud.

The fruits of paraphernal property belong to the community, so long as the husband retains the administration of it.

**A**PPEAL from the District Court of Madison, *Selby, J. J. M. Moore* and *A. R. Hynes*, for plaintiff. *Alonzo Snyder*, for defendants. The judgment of the court (*Eustis, C. J.*, absent,) was pronounced by

*Ross, J.* The defendants, who are judgment creditors of *Charles H. Webb*, caused certain lands to be taken in execution, as his property; his wife filed a petition, making opposition to the seizure, and alleging, that she was separated in property from her husband; and that she had acquired the lands seized, with her own funds, and in her own name and right, since the separation.

The defendants answered by a general denial, and an averment that the judgment of separation was fraudulent and simulated; and that the property seized, was liable for the debts of the husband. There was judgment for the plaintiff perpetuating the injunction, and the defendants appealed.

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The property seized, having been purchased by the plaintiff during marriage, is liable for the debts of the community, unless she can bring herself within some exception to the general rule, prescribed by article 2371 of the Code. The exception, which she invokes, is, that she purchased after she had obtained a judgment of separation from her husband, and the community previously existing between them had been dissolved; that judgment is, therefore, a part of her title, and adversely to creditors, she is bound to show, affirmatively, its reality and good faith; she has utterly failed to do so.

In the suit of separation, she claims judgment against her husband for the value of a gold watch, and interest at ten per cent on that value for four years; and also, the hire, during four years, of paraphernal property, of which the husband had retained the administration, and interest at ten per cent thereon. The husband made no defence, and she obtained judgment for two hundred and twelve dollars, the supposed value of the watch; the judgment further decreed, a separation of property.

The fruits of the paraphernal property clearly belongs to the community, so long as the husband retained the administration of it; and there is nothing in the record to show, that the plaintiff ever owned a watch, which her husband took and converted to his use.

The action of separation was without any foundation, so far as property of the wife was involved; and as the petition did not allege, that she had a separate industry, the earnings of which she wished to secure for the maintenance and support of herself and her family, it had nothing to rest upon. The case, in that respect, is stronger against the pretensions of the wife, than those of *Dennis-ton v. Nutt*, 2d Ann. 311; and *Harden v. Nutt*, 4th Ann. 66. Under the view of the law taken in those cases, and to which we adhere, the judgment of separation was a nullity, incapable of producing any legal effect; the wife acquired no title to the property of the husband, which she purchased under it; and not being separated in property, the purchases which she subsequently made, fell into the community, and are liable for its debts. The prescription pleaded, is inapplicable to the case.

It is ordered, that the judgment be reversed; it is further ordered, that there be judgment against the plaintiff, and the defendants be allowed to procede under their executions, to advertise and sell the land seized as in the record described. It is further ordered, that the plaintiff pay costs in both courts.

SLIDELL, J. I am not prepared to say, that I concur in all the legal propositions enunciated in the opinion of Mr. Justice Rost. But I concur in the reversal of the judgment of the court below, upon the ground, that the evidence is unsatisfactory to my mind, and insufficient, upon a view of the whole case, to sustain the judgment of separation, or to show an acquisition with funds of the wife.

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### E. B. TOWNE v. J. W. COUCH, Sheriff, et. al.

There is nothing illegal in an agreement in the sale of a suit by which it is stipulated, that the suit shall be prosecuted in the name of the plaintiff, for the benefit of the assignees. Satisfaction of the judgment entered by the parties to the record, or by the sheriff, would protect the defendant.

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**A**PPEAL from the District Court of Madison, *J. N. T. Richardson, J. W. Perkins*, for plaintiff. *J. J. Amonett*, for defendants. The judgment of the court (*Eustis, C. J. absent*), was pronounced by

**ROSE, J.** The plaintiff has enjoined an execution upon a twelve months' bond given by him in the suit of *Bruner, Morgan and Markham v. Lee*, for the purchase of an undivided half interest in certain sections of land seized in that suit as the property of *Lee*. The grounds of injunction insisted upon in this court are: First, that the plaintiffs in execution have no interest or property in the debt, having long since transferred it to the firm of *Martin, Pleasants & Co.* Second, that since the purchase of the property by the plaintiff, a suit has been commenced to evict him from one undivided half of it.

It is in evidence, that after the institution of the suit against *Lee*, the claim of the plaintiffs was transferred to *Martin, Pleasants & Co.*, with the express agreement, that the suit should go on in the name of the original plaintiffs, for the benefit of the assignees; there is nothing illegal in such an agreement, and neither *Lee* or the present plaintiff have anything to do with it. A satisfaction of the judgment entered by the parties to the record, or by the sheriff, as the case may be, will sufficiently protect them.

On the trial, witnesses were offered by the defendant to testify, that at the sheriff's sale, the plaintiff's attorney and the sheriff proclaimed to the bidders, that the interest of *Lee* in the lands about to be sold, was only one-fourth instead of one-half, as stated in the advertisement; and also, that the plaintiff in injunction knew the extent of *Lee's* interest, and the defects of the title he pretended to have. The plaintiff excepted to this testimony, on the ground that it contradicted the advertisement and the sheriff's deed; the objection was overruled, and the plaintiff took a bill of exceptions.

The testimony may not have been admissible to contradict the advertisement and the sale by the sheriff, but it was properly received in support of the allegation in the answer, that the plaintiff had knowledge, at the time of the purchase, of the outstanding title to a portion of the land upon which he has since been sued; the evidence establishes that fact conclusively, and the plaintiff has no color of right to refuse to pay the price before actual eviction. *C. C. 2535, 2598. Bemis v. Dwight, 3d Ann. 337. Fuller v. Harman, 9 R. R. 205. Salland v. Lee, 9 R. R. 514.*

The defendants have asked that the judgment be amended so as to allow them interest and damages. We think they are entitled to that relief.

The judgment is therefore amended, so as to allow fifty dollars for interest against the plaintiff, and the sum of fifty dollars for damages against him and *George D. Shadburne*, his surety on the injunction bond in *solido*; and, as amended, the judgment is affirmed, with costs.

### MARY LOUISA GRICE v. MARTHA ANN PEARSON et al.

No action can be maintained against the heirs of a deceased person, upon the promise of the deceased person to take charge of the plaintiff, to educate her, to settle her in life, and to give her the bulk of her estate, at her death; even where the deceased had made a will in favor of the plaintiff, which was adjudged to be void from defects of form. Such a promise by the deceased would be void for uncertainty, and being in the nature of donations *mortis causa*, will be considered as revoked, unless embodied in a valid will.

**A**PPEAL from the District Court of Concordia, *Farrar, J. Alfred Hennen*, for plaintiff. *Stacy and Sparrow*, and *R. H. Marr*, for defendants. The judgment of the court (*Eustis, C. J.*, absent,) was pronounced by

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*ROSE, J.* This is an action against the heirs at law of *Nancy Neal Jones*, deceased, upon her promise to take charge of the plaintiff, to educate her, to settle her in life, and to give her the bulk of her estate at her death, which promise, it is alleged, was in part executed by *Mrs. Jones* taking charge of the plaintiff and putting her to school; and, also, by making a will in her favor, which has since been adjudged to be void, for defects of form.

The defendants excepted to the action, on the ground, that the petition discloses no cause of action; and the plaintiff has appealed from the judgment sustaining that exception.

We are of opinion, that the petition discloses no obligation, binding in law upon the heirs of the deceased, however binding it may be in conscience. The alleged promise of the deceased, to settle the plaintiff in life, and to give her the bulk of her estate at her death, even if made in the proper form, would be void for uncertainty; they, moreover, partake of the nature of dispositions *mortis causa*; they were essentially revokable, during the life of *Mrs. Jones*, and must be considered as revoked, unless they have been embodied in a valid will.

Since the abolition of adoption in this State, tutors and under-tutors are not permitted to surrender the absolute control and care of the persons of minors to any one, except so far as may be necessary for their education; and no action can be maintained on the agreement, entered into for that purpose, with *Mrs. Jones*.

It is therefore ordered and decreed, that the judgment be affirmed, with costs.

### SUCCESSION OF AUGUSTE TETE.

Where the husband buys property at the succession sale of his wife's father, for which he gives his own notes, and they are afterwards received by him in settlement of his wife's share of the succession, she has a legal mortgage against his property for the amount of the notes, provided it is shown, that he was solvent at the time he received them.

The article of the Civil Code, 2235, in declaring, under what circumstances the authentic act shall not be full proof between the parties, uses the word "*forgery*" in the sense of "*falsity*."

The offence of making a false act by a notary, is punishable by the act of 7th of June, 1806.

Where a notary has been convicted of a misdemeanor in office, by executing a *false* act, the instrument no longer makes full proof; but, until the act is attacked on this ground, it remains authentic and valid in point of form. There are exceptions to this general rule, viz., cases in which one individual personates another, or where an insane person makes a will.

**A**PPEAL from the District Court of Assumption, *Randall, J. J. C. Beatty*, and *Benjamin and Micou*, for the widow *Tete*. *C. A. Johnson* and *Miles Taylor*, for *Blanchard, Eimer & Co.*, creditors. The judgment of the court (*Preston, J.*, not sitting in the cause from interest,) was pronounced by

*EUSTIS, C. J.* This appeal is taken by certain judgment creditors of the succession of the late *Auguste Tete*, from a judgment of the Court of the Fifth District, by which a preference over their claims is accorded to the surviving

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wife, resulting from a receipt by her husband of his own notes, as the paraphernal property of the wife. A similar case, in the same succession, came before us in 1849, and it is reported in 4th Ann. 465, under the title of *Slatter v. Tete*.

The evidence in that case, established the delivery of the notes to the husband. They were received by the wife, on a partition of the estate of her deceased mother, as her share in the succession, and were handed by her to her husband. These notes bore neither privilege nor mortgage; no proof was administered of their value, or of the solvency or pecuniary condition of the affairs of the husband, at the time. Under the provisions of the articles 2367 and 3286 of the Code, and uniform jurisprudence of the State, we are compelled to decide against the claim of the wife, in favor of the judgment creditor of the succession.

In the present case, that difficulty has been removed, and it is established by competent evidence, that the husband was amply solvent at the time he received the notes. The notes were, therefore, the representative of real value; and conceding, that their delivery is sufficiently proved, as their origin is unquestionable, we will assume that they created a legal mortgage, in favor of the wife, on the property of the husband. Subsequently, the appellee executed acts of renunciation of her mortgage, in favor of the appellants; and, on the trial of the cause, the appellants having offered these acts in evidence, the appellee offered testimony to contradict them, and to show that they had not been signed by her, in the presence of the notary. The district judge received this evidence, to the admission of which, a bill of exceptions was taken. The grave question presented, by this bill of exceptions, has been argued with great care at bar, and we will proceed to determine it, without noticing the very irregular manner in which it was raised in the court below; and, under the hope, that matters of this importance will be brought before us in a distinct and separate suit, and not cumulated with proceedings which only embarrass their decision. The effect given by law to authentic acts, rests upon the presumption, that a public officer, exercising a high and important trust, under the solemnity of an oath, has done his duty when acting within the scope of his authority. Selected for their character, capacity and probity, as notaries are presumed to be, the law attaches full credit to their official acts. This prerogative is established in the interest of public order, to maintain peace among men, and to prevent contestations concerning the proof or evidence of their conventions. The act passed before a notary, under the formalities prescribed for its execution, constitutes a record and a certified copy, under the hand and seal of the officer, is received as full proof of the original. Courts of justice, by means of these officers, are relieved from a large mass of business, which would otherwise impede and embarrass their ordinary proceedings. Meetings of creditors are held before notaries; a large portion of the business of suits in partitions, is accomplished before them. They make wills; they hold and conduct meetings of families, in which the interest of minors are concerned; they receive acknowledgments of the condition of persons, acts of emancipation, donation, and every species of conventional obligation. Indeed, the importance of their duties, and of the faith to be attached to their acts, cannot be overstated; they reach every relation of society through the life of man, and his death is a new call for their services. All proceedings in the settlement of successions, not had in court, are conducted before the notary.

The authentic act, as relates to contracts, must be executed before a notary public, in the presence of two witnesses, free male and at least fourteen years of age, or of three witnesses, if the party be blind. If the party does not know

how to sign, the notary must cause him to affix his mark. Code 2231. The authentic act is full proof of the agreement contained in it against the contracting parties, their heirs and assigns, unless it be declared and proved a forgery. Art. 2233.

An act, whether authentic or under private signature, is proof between the parties, even of what is there expressed only in enunciative terms; provided, the accusation have a direct reference to the disposition. Art. 2235.

The first part of the article 2233, is taken literally from the article 1319 of the Code Napoleon, which provides: "L'acte authentique fait pleine foi de la convention qu'il renferme entre les parties contractantes et leurs heritiers ou ayant cause. Neanmoins en cas de plainte en faux principal, l'exécution de l'acte argué de faux sera suspendue par la mise en accusation; et en cas d'inscription de faux faite incidemment les tribunaux pourront, suivant les circonstances, suspendre provisoirement l'exécution de l'acte."

The article of our code is silent, and contains no provision whatever as to the mode of proceeding, by which the forgery or falsity of the act is to be established. The article of the Code Napoleon contains ample provision on this subject. The words of the article in that code, are technical and peculiar to the French criminal jurisprudence; and the word forgery in our code, is not used in the particular sense of our criminal law, but in the sense of the word *faux*, or falsity. The article in the French Code means, that the authentic act is full proof of the agreement contained in it, &c.; but, in the event of a public charge of falsity being made, affecting the act, its execution shall be suspended during the prosecution; and, in the event of a charge of falsity being made incidentally, courts may, according to circumstances, suspend, provisionally, the execution of the act. In order to understand the whole scope and operation of this article, a reference must be had to the mode of proceeding under it. In the first case stated in the article, where there is a public accusation of falsity, the accused is delivered to the criminal tribunal, under the forms of an ordinary prosecution for a crime; this is called, the charge *en faux principal*. In the other case, that of the charge of falsity made incidentally, *faux incident*, is, when in the cause of a suit, the charge of falsity is formally made, and the nullity of the act demanded by reason of its falsity. In this case, the proceedings are conducted according to the rules laid down in the code of civil procedure. The civil suit is suspended until the proceedings on the charge of falsity are determined, whenever the charge is made by one of the parties, touching an act which is to be relied upon as evidence in the suit. The mode of making the charge, and the proceedings under it, are regulated by special articles of that code. The result is, that the proceedings may be considered as initiatory of a criminal prosecution, if there should be proofs of falsity or falsification; and that no judgment can be pronounced, either initiatory or final, in relation to the falsity, except on the action of the officer representing the State, to whom all charges of falsity must be communicated, by reason of the interest of society in the preservation and truth of public records.

The authentic act makes full proof of the conventions and facts, which it is competent for the notary to certify, so that they cannot be repelled by a simple denial, nor can their falsity be proved by ordinary means. Their falsity can, undoubtedly, be proved, because a public officer may fail in the discharge of his duty, and the law would not leave the citizen without a remedy; but such proof can only be made in the difficult proceedings of inscription *de faux*, under the Code of Procedure, art. 214 to 251.

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The authentic act, not only is full proof of the agreement, but of what passed before the notary in the completion of the act ; not only of *quod contentum*, but *quod actum est*. Droit Civil par Marcadé, vol. 5, p. 24. Commentary on art. 1319. Code of Civil Procedure, articles 214 to 251.

We have no such provisions in our law ; our codes and statutes are silent on the subject. The mode in which the act, the authenticity of which is attacked, shall be declared and proved a forgery, was undoubtedly intended by the framers of the code, to be provided for afterwards ; but, the omission has never been supplied by any subsequent legislation. The very embarrassing question presents itself, whether authentic acts are on the footing of ordinary writings, as to their effect as evidence, or are protected by the sanctions with which the security of property and of personal rights, as well as the law, requires they should be invested.

It must not be supposed, that the offence of making a false act by a notary public, is without punishment by our laws. It comes within the denomination of misdemeanors in office, and is reached by a statute of the 7th of June, 1806.

If any judge, justice of the peace, sheriff, or other civil officer, shall be guilty of any misdemeanor in the execution of either of their respective offices, he shall, on conviction thereof, suffer fine or imprisonment, or both ; shall be rendered for ever incapable of holding any office of profit or trust, and shall, moreover, be liable to action by the party injured.

If a notary officially certifies to be true, what he knows to be false, he is guilty of a misdemeanor, and can be punished under this statute. The sentence of the offender carries with it, necessarily, the decision of the court on the falsity of the act on which the prosecution rests ; and it may be considered as a declaration, and that its falsity has been proved. In such a case, the requisites of the article 2233, has been complied with virtually ; and the act no longer makes full proof, or has the attribute of authenticity, which it previously had.

By pursuing this course, in the establishment of the falsity of the act, the reason, purpose and spirit of the article 2233, are carried out, and its letter is observed as closely as the present state of our legislation will permit. The law looks to the preservation of the authenticity of acts passed before a notary, as a matter of public order, in which the great interests of society are involved, and will not permit the official doings of the public officer to be drawn in question, except where the law itself has been violated ; and, as in other criminal cases, requires the intervention of its minister, before the truth of its records can be called in question. This requisition is no obstacle to the parties having full recourse in annulling or impairing the effect of an act, by way of rescission, for any of those causes which affect the validity of the agreement contained in it. The act may be authentic and valid in point of form, and the agreement it contains may be a nullity or inoperative, in whole or in part. It may be defective in point of form, and invalid as an authentic act ; but the contract, under private signature, which it contains, may be perfect in form and effect. The validity of the agreement is independent of the authenticity of the act, which is a matter of form ; and which, when clothed with certain forms, the law requires should be maintained. The records of a notary are closely assimilated to judicial records. The whole system of executory process is based on this resemblance. It is resorted to when the creditor's right arises from an act importing a confession of judgment, and contains a privilege or mortgage, which is an act passed before a notary and witnesses, in which the debt is acknowledged ; for which, the mortgage or privilege is given. C. P. 732 *et seq.* This act, the law



declares, shall make proof between the parties, unless it be declared and proved to be a forgery. 8 Toullier, 64 *et seq.*

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Pothier says, the authentic act makes full proof, by itself, of what it contains. Nevertheless, authentic acts may be attacked as false, but until the accusation of falsity is determined, and the acts have been adjudged to be false, they must be provisionally executed, which is decided by the law 2. Code *ad leg. corn. de falsis*. A wise decision, since crime is not to be presumed; and it would be dangerous to allow debtors to procrastinate the payment of their lawful debts, by accusations of falsity. Pothier on Ob., 734. It remains to consider the various decisions referred to by counsel, in opposition to the view we have taken of the intent meaning and effect of this article, 2233.

It may be proper to restate the question under consideration, as presented by the bill of exceptions. The testimony received under the objections of the appellants was to show, that the acts of the renunciation were not signed by the appellee, in the presence of the notary, in the presence of witnesses. The witnesses offered, whose testimony was admitted, were the notary public, before whom the acts purported to have been passed, and one of the subscribing witnesses, the other witness having died. They proved the fact, that the act was not signed in their presence, but it is not pretended that the act was not signed by her own free will, and without the influence of force, fraud, or stratagem. The renunciations of the rights of the appellee of her tacit mortgage in favor of the appellants, were made in consequence of the obligation the husband took upon himself in granting the mortgage to secure their debts, to affect the release of the tacit mortgage of the wife. This formal obligation in the acts of mortgage, the wife complied with, by executing the acts of renunciation in favor of the several mortgage creditors, in which there is a recital of her appearance and signature, at the office of the notary, in his presence and that of the witnesses, and with the authorization of her husband; the acts bearing the signature of all. Under this state of facts is the appellee permitted to contradict these declarations, and prove, not that the act was not signed by her, but that it was not signed by her as stated in the act, in the presence of the notary and witnesses? What is our jurisprudence in relation to this question, whether or not the form of the act can be invalidated by disproving a fact necessary to its validity as an authentic act which has been acknowledged formally by the party, and certified to officially by the notary, and attested by the subscribing witnesses? A large number of the decisions referred to by counsel, relate to the admissibility of the notary to contradict his own certificate. These cases do not affect the question we are endeavoring to solve, and need not be particularly noticed.

The first case in point of time which is considered as pertinent, is reported in 5 M. R. 405. It is that of *Langlish v. Schons*, and was tried before the Supreme Court, in 1818. The first was instituted in order to have a notarial act, which purported to be an act of donation of liberty from the plaintiff to his slave, declared null and void, as forged and fraudulent, and to obtain damages against the defendant for his agency in the fraud. The evidence adduced to prove the forgery, was the testimony of one of the subscribing witnesses; but it was held insufficient to establish the allegation of forgery. The judgment of the lower court was reversed, and judgment rendered for the defendants. The next case is that of *Marie v. Abert's heirs*, 6 M. R. 731, and 8 M. R. 512. The heirs attacked the will of their testator, which was in the form of an authentic act, on the ground of the insanity of the testator. The

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opinion in that case states, "The next point seems to have been before us in the case of *Langlish v. Schons*. We there held, that a public act might be impeached by the witnesses who subscribed it. The declaration of such witnesses in this, as in every other case, may be opposed by other testimony.

In the case of the *Firemen's Insurance Company v. Cross*, a wife who had mortgaged her property to secure the payment of a loan received by her husband, which did not inure to her benefit, was permitted to prove by parol, to show that fact, although she appeared alone in the act as having borrowed the money with the authority of her husband. 4 R. R. 509.

In the case of *Payne v. Phegue*, in which a married woman sought to annul an act of mortgage given to creditors of the husband, fraud and deception were alleged to have been practised on her in obtaining her signature to the act, which was not executed in the presence of the witnesses, as it purported to have been. The notary and witnesses were permitted to testify to this fact; but no objection was made to the admission of their testimony. The question presented in the present suit did not arise. It was determined, in that case, that the renunciation which was opposed by the defendants to the rights asserted by the plaintiff was not legally established. The act which was said to contain it, was not authentic, because her renunciation was not received in the presence of two witnesses, as was proved by the testimony of the notary, and witnesses received without any exception being taken. The two first cases, that of *Schon's* and of *Abert's heirs*, were determined before the repeal of the Spanish laws, and it does not appear to us, that either of them purport to settle any general rule in relation to the effect of authentic acts. The cases cited by the counsel for the appellants, relate rather to the competency of the notary than the admissibility of the evidence. We do not see how the evidence received under the bill of exceptions can be admitted, without destroying the distinction between public and private acts, and the security afforded by the law to public records. Parties have their full remedies against their conventions, evidenced by authentic acts, in cases of fraud, violence, or deception, but we think that as to the requisites of the act, the certificate of the public officer must be held conclusive, unless the act is established to be false. Unless the public officer is adjudged to be delinquent, his official acts must stand, and this delinquency must be prosecuted as an offence, in the punishment of which, the State has a deep interest. There may be, doubtless, exceptions to this general rule. The case of a will made by a person insane, as in *Abert's* case, was that of one person representing another, and thus imposing on the notary and witnesses, would not be within its reason or operation. But we find nothing in the case before us which takes it out of a principle which, in the view of the consequences of a contrary doctrine, we are compelled to adopt. Under the allegations with which the case comes before us, we do not feel ourselves at liberty to remand it, inasmuch as this is the second time the marital rights of the appellee have been before us.

It is therefore decreed, that the judgment of the district court be reversed; and it is further decreed, that the proceedings before the notary be set aside, that the preference claimed by the appellee to be paid out of the proceeds of the property of the succession adversely to the appellants be disallowed, and the preference to be paid as aforesaid, over her, be adjudged to the appellants; that the administratrix proceed to the sale of the property of the succession without delay, and the payment of the debts thereof; and the appellee pay the costs of this appeal.

SLIDELL, J., dissenting. Under some of the decisions of our predecessors, cited by the counsel of *Mrs. Tete*, I have come to the conclusion, that the individuals who witnessed the acts of renunciation, were admissible to prove, that *Mrs. Tete* did not sign before the notary and witnesses, but out of their presence, and that independent of the notary's testimony, which in my view of the matter it is not necessary to determine, their testimony, which the district judge believed, is sufficient proof of the facts. But I must say, that I regret not being able to concur in the views of my brethren, as the ruling is more likely to conduce to the public good.

SUCCESSION  
OF  
TESTS.

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SAME CASE—ON A RE-HEARING.

THE judgment of the court, on a re-hearing, was pronounced by EUSTIS, C. J. It is ordered, that the former judgment of this court be set aside; that a new trial be awarded, and the case remanded for further proceedings according to law; the appellee paying the costs of this appeal.

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JOHN McLAUGHLIN v. E. GOODCHAUX et al.

Where it is agreed between the proprietor and contractor for the building of a house, that in case of disagreement between them, the controversy is to be settled by arbitration, and they do submit their dispute to arbitrators, who render their award before the proprietor has received notice from workmen and others claiming a privilege for the amounts due them, not to pay the contractor, those creditors cannot complain of the award, unless they can show, conclusively, that injustice has been done them. The creditors can only claim their privilege upon what is justly due to the contractor under the contract.

APPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Walker*, for plaintiff. *J. Meunier, Z. Latour*, and *W. O. Denegre*, for other creditors. *J. Blodget Britton*, for defendants. The judgment of the court (*Eustis, C. J.*, absent,) was pronounced by

SLIDELL, J. This case presents a controversy between the proprietor of a house and certain creditors of the contractor, who had supplied materials and labored therefor.

By the building contract, it was stipulated that the work should be paid for by installments. The only difficulty raised by the contractor's creditors, concerns the settlement of the last installment. This settlement took place under the direction of arbitrators, who were appointed by *Haber*, the proprietor, and *Goodchaux*, the contractor. In the notarial contract between them, for the erection of the house, it was agreed, that if any difficulty should arise between them, in relation to any matter arising from the contract, it should be referred to arbitrators, and their decision should be final and binding. The buildings were finished about the 20th of November. There was an attempt to show that some bolts had not been furnished, and that, therefore, the work was not finished. But a witness, who was one of the arbitrators, testifies, that these bolts were not comprehended in the contract, and such appears to have been the opinion of the

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v.  
GOODCHAUX.

other arbitrator, although his testimony on the subject is somewhat confused. The difficulty between the parties was not whether the house was finished; but, whether the quality of the work was as good as it should have been under the contract. These arbitrators considered the subject, made allowances for the defective character of a part of the work, and, accordingly, on the 4th of December, 1850, *Haber* gave his notes, as stipulated by the contract, for the balance of the last installment, after deducting the allowances for the defective character of the work; also, a sum paid in cash to one *Goldsmith*, by *Goodchaux's* direction, and the amount of the bills of four creditors for labor and supplies, namely, *Hill*, *Monseau*, *McLaughlin* and *Géin*. We do not find any sufficient ground to question the good faith of the parties in this submission to arbitration, or the fairness of the award. And we are unable to see why creditors, who had not given any notice prior to this submission to arbitration, should be permitted to disturb it, unless they could, at least, establish conclusively that injustice had been done. If the character of the work was inferior to what the contract called for, *Goodchaux* was bound in law and justice to submit to a fair deduction; and certainly his creditors, under the act of 1844, had no higher rights, in this respect, than he had. The object of the statute of 1844, is to secure to the workmen and others, who take the proper steps, the benefit of what the proprietor may justly owe under the contract, and no more. All that was due under the contract was, in our opinion, fairly settled for and paid by *Haber*, on the 4th of November, 1850, except an amount of eight hundred and fourteen dollars and fifty-five cents, which he retained in his hands, in consequence of the notices by *Hill*, *Monseau*, *McLaughlin* and *Géin*. *Haber* paid *Monseau* his claim on the 5th of December, 1850, and *Géin* his on the 19th of December. The accounts of *Hill* and *McLaughlin* were disputed, and *Haber*, under the terms of the receipt, was not to pay them until a judicial decision. The only creditor, except those named in the reservation of the receipt, who attempted to notify *Haber*, before *Monseau* and *Géin* were paid, is *Maury*. His notice was not served on *Haber* personally, nor at his domicile, but was given to one *Goldsmith*, his partner, at the counting house of *Goldsmith, Haber & Co*. This was not a legal service on *Haber*, adopting the analogy of the rules in case of citation or garnishment; and it is not shown that the notice actually reached *Haber* before he paid *Monseau* and *Géin*.

The only amount which remains unpaid by *Haber*, and subject to distribution among the creditors for materials and labor, is the sum of four hundred and sixty-five dollars and forty-five cents, which is to be divided among them *pro rata*. This amount *Haber* has deposited in court.

It is therefore decreed, that the judgment of the district court be reversed; it is further decreed, that the said *Haber* be discharged from all liability under the building contract, whereof a copy is on file in this cause, and that the sum of four hundred and sixty-five dollars and forty-five cents, deposited by said *Haber* in the court below, be applied, first, to the payment of the costs of this suit, including the costs of this appeal; and, secondly, to the payment of a *pro rata* dividend to the following creditors upon the following sums, to wit: *J. McLaughlin*, two hundred and fifty-nine dollars and eight cents; *Allan Hill*, two hundred and six dollars and fifty-seven cents; *J. A. Blanc and Brother*, three hundred and sixty-eight dollars and eighty-four cents; *Newton Richards*, eighty dollars; *Julien Maury*, two hundred and thirteen dollars and seventy-six cents.

## MARY ANN GUIER v. PHILLIP GUIER, Administrator.

An usufruct in real estate or slaves must be established by written evidence; parol proof of its existence is insufficient.

An administrator of an estate, in matters concerning the succession, is subject to the ordinary rules of evidence, and even when interrogated on oath to answer interrogatories as a party, he cannot give evidence in favor of his mother against the succession.

**A**PPEAL from the District Court of Carroll, *J. N. T. Richardson, J. Short* and *Parham*, for plaintiff. *Selby*, for defendant. The judgment of the court was pronounced by

PRESTON, J. The plaintiff alleges, that *George Guier*, deceased, who was her son, purchased three slaves, named *Bob, John* and *Clarissa*, with money which was furnished by her and her deceased husband, *John P. Guier*, amounting to about eighteen hundred dollars; that the money came to them as their portion of the succession of another son, named *Emanuel Guier*, who died, leaving no descendants. She alleges, that the condition on which the money was furnished to *George Guier* was, that he should purchase the negroes in his own name, which he did, but that they should be under the control and management of her late husband and herself, who were to have their services and labor during their lives. She further states, that in point of fact, she and her late husband did enjoy the services of the slaves during a period of about ten years, but that the defendant, who is the administrator of *George Guier's* estate, in 1848, took the slaves from her, and refuses to allow her their services or hire, which is worth two hundred and fifty dollars a year. She sues the defendant for the enjoyment of the services of the slaves, and in default thereof, for the sum of \$1800.

Usufruct may be established by all sorts of titles; by a deed of sale, by a marriage contract, by donation, compromise, exchange, last will, and even by operation of law, and may be established on every description of estates, movable or immovable, corporeal and incorporeal. Code, 532, 533.

We think it a fair and reasonable interpretation of these articles, that when a usufruct is established on immovable property, it should be established by a written title. The usufruct creates an interest in the property itself, which is transferred from the owner to the usufructuary. Now, every transfer of immovable property, or slaves, must be in writing. Code, 2255. We see no reason why an antichresis should be in writing, and that the establishment of a usufruct on real estate should not be. Both give rights upon the immovable property itself, and our laws have ever guarded the interests in immovable property by written titles.

We think, therefore, the verbal testimony as to the ownership of the slaves, in opposition to the written titles, should have been rejected by the court.

The defendant himself was put upon oath, and substantially admitted the usufruct claimed, taking a bill of exceptions, however, to the opinion of the court, that he could be put upon oath, and to the admission of his answers to interrogatories, as evidence. He was the administrator of an estate, and on that account his testimony was subject to the ordinary rules of evidence. Being the son of the plaintiff, he could not testify for or against her. Code, 2260.

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v.  
GUIER.

The plaintiff claims, that in case of her failure to establish the usufruct, eighteen hundred dollars, the value of the slaves, should be paid to her, because they were bought with money belonging to her late husband and herself, from the estate of a deceased son, *Emanuel Guier*. They sold their interest in his estate to their son, *George Guier*, and it appears by the bill of sale, that they were paid, as fully acknowledged by them in 1834. And even if the funds were, in point of fact, left in the hands of the vendee, to purchase slaves for the plaintiff and her late husband, still, their claim to the funds has long since been prescribed as plead by the defendant.

The judgment of the district court is reversed, and the appellee is decreed to pay the costs in both courts.

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ABRAHAM BASS v. N. E. LARCHE, Tutor.

Where the husband claims property purchased in his own name, during the existence of the community between him and his wife, it is incumbent on him to show a clear intention to make an investment on his own account, and this should be so established as to have thrown the loss on him separately, in case the property purchased had been lost.

**A**PPEAL from the District Court of Carroll, *J. N. T. Richardson, J. Short* and *Parham* for plaintiff. *M. Dubose*, for defendant. The judgment of the court was pronounced by

ROST, J. The only question in this case is, whether certain lands and slaves purchased by the plaintiff during his marriage, became his separate property, or fell into the community existing at the time between him and his late wife. The district judge held them to be the separate property of the husband, and the under-tutor of his children has appealed.

We are of opinion that the judgment is not sustained by the evidence. The application of the plaintiff to the district court, after his marriage, to be dispensed from the time required by law to attain the age of majority, because he was soon to come into the possession of funds which he desired to vest in real estate, does not show a clear intention, or any intention at all, on his part, to make the investment for his separate account, and as he was the head of the community, the fact that he purchased in his own name, proves nothing in his favor. The evidence of his intention to purchase for his separate account, should be sufficient to throw the loss upon him in case the property purchased had diminished in value, or totally perished. The evidence in the record would not raise even a presumption of separate ownership, if it was denied by the plaintiff. The plaintiff purchased property to a much larger amount than he had funds to pay for at the time, gave some obligations, and assumed the payment of others; it might be doubted, whether such a purchase could, under any circumstances, be considered as an investment of separate funds.

It is therefore ordered, that the judgment in this case be reversed. It is further ordered, that the following property be, and it is hereby adjudged to belong to the community, between the plaintiff and his late wife, *Sarah E. Bass*, to wit: the slaves *Peter, Harrison, Mary, Jones, Bersheba, Queen, Maryann, Lydia, Burrell, Ben, Giles, Melton, Matilda, Manuel, Hannah, Elvira, Isaiah, Moses, Ellen, Peter, Job, Jerry, Lavina, Alexander Scott, Tena, Bethena, Rachel Davis, Henderson, Claiborn, Joseph, Dick Donnell,*

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Ndly, *Georgiana*, and their increase; and lands, to wit, lots numbered 5 and 6, in township 20, range 13 east, fronting on the Mississippi river, with forty acres to be taken off of the lower side of lot number four, in same township and range, as specified in the deed of sale from *Warren M. Benton* to said *Abraham Bass*, with the back concession of said lots 5 and 6, and the portion of lot number 4, being in section number 64, and a part of section 63, in the same township and range; being all the land embraced in the deed from *Theodore D. Elliott* to *Abner* and *James Roberts*, except the portion embraced in the deed to *James A. Bass*, containing, in all, eight hundred and forty-three and two-thirds acres; and that *Abraham Bass*, the plaintiff and appellee, pay the costs of this proceeding.

BASS  
v.  
LARGHE.

### JOHN O. BANNON v. ABRAHAM BARNETT et al.

The curator of a surety on a bond to release property which has been attached, cannot maintain an attachment against the principal on the bond, unless the surety has made a payment.

**A**PPEAL from the District Court of Carroll, *J. N. T. Richardson, J. Drew* and *Bonner*, for plaintiff. *Short* and *Parham*, for defendants. The judgment of the court was pronounced by

*Euris, C. J.* This suit was instituted by *Bannon*, in his lifetime, against *Abraham Barnett* and *John M. Robinson*. *Bannon* died during the pendency of the suit; his curator was made a party plaintiff. *Bannon* was an absentee, residing in Arkansas; the curator was appointed in the parish of Carroll, under the act of 1838, authorizing the clerks of courts to appoint curators in certain cases. The suit was commenced by attachment against the property of *Barnett*. There was no service of process on *Robinson*. The plaintiff was nonsuited in the court below, and has taken this appeal.

The cause of action set forth in the petition is, that *Bannon* was one of the sureties on certain bonds given by *Robinson* and *Barnett*, in Arkansas, for the purpose of effecting the release of certain property attached.

It is not pretended, that *Bannon* ever paid anything as the surety of these defendants. On the contrary, it appears that during the pendency of the suits on the attachment bonds against *Bannon* and *Craig*, his co-surety in the court of Arkansas, *Bannon* died, and no judgment was had against his representatives, but judgment was rendered against *Craig* alone; the plaintiff taking a nonsuit as to the deceased.

*Craig* may have a right of action for indemnity against the principals in the bond; but the curator of *Bannon*, appointed in this State, cannot maintain this suit under our attachment laws.

The judgment of the district court is therefore affirmed, with costs.

## GOVEY HOOD v. R. J. CHAMBLISS.

Where the answers of a party to interrogatories propounded to him in another suit, are offered in evidence against him, an objection to their introduction will not be sustained, upon the ground that he had not an opportunity of explaining himself fully, because the suit in which the interrogatories were propounded was between other persons.

**A**PPEAL from the District Court of Carroll. *J. N. T. Richardson, J. Louis Selby*, for plaintiff. *W. Bryan and J. B. Bemiss*, for defendant. The judgment of the court was pronounced by

**SLIDELL, J.** This action is upon a note signed by the defendant as surety. His defence is, that he has been discharged by reason of delay given to the maker, *Boyd*.

It appears that a contract was made by *Hood* with *Boyd* and *Bell*, by which the two latter contracted to build a gin-house for *Hood*. The price for the work specified in the contract, is stated therein at \$1500, none of which was to be paid until after the work was finished. The defendant, in order to prove that *Hood* had given time to *Boyd*, offered in evidence the answers of *Hood* under oath, to interrogatories propounded to him in certain suits brought against him by creditors of *Boyd* and *Hamilton*, whose claims were connected with the building of the gin-house, and who asserted privileges upon the price which *Hood* had contracted to pay for the building. In these answers, *Hood* asserted, that it was agreed with *Boyd* and *Hamilton*, that the note now in suit should be taken by them in payment for building the gin-house; and in one of them he declares, that this agreement was made when the building contract was entered into. The plaintiff objected to the introduction of this evidence, upon the ground that the answers were made with a view to other issues between other parties, and that when *Hood* answered, he had not an opportunity of making any explanations in his own favor (meaning, we suppose, explanations pertinent to the present controversy.) The objection was accompanied by an offer to answer like interrogatories anew, if put in this cause.

We think the objections to the evidence were properly overruled. It is well settled, that the admissions of a party may be given in evidence against him. Even mere oral admissions in conversation may be proved; and *a fortiori*, what a person has declared in writing and under oath, should be admissible against him. Such admissions, however, when received, are to be considered as a whole, and with proper reference to the circumstances and occasions. The idea that, when they are so offered, the party who has made them should be permitted, at the trial, to give his own testimony in explanation of them, is entirely novel and inadmissible under our rules of evidence.

The admission, therefore, stands as the admission of a fact which the party cannot be permitted to explain or contradict by his own testimony. If, as was suggested by counsel, *Hood* might have added, if now interrogated, that the agreement respecting the note was made with the consent of *Chambliss*, the surety, the reply is, that although he cannot testify for himself, he was not precluded from proving such assent by other competent evidence.

The plaintiff having made an agreement with the principal debtor, which precluded him from pursuing that debtor during the time necessary for building



the gin-house under the contract, and it not being proved that this arrangement was made with the assent of surety, it follows, that the judgment of the court below, which discharged the surety, must be sustained. C. C. 3030, 3032.

Judgment affirmed, appellants to pay costs of appeal.

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v.  
CHAMBLISS.

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### THE STATE v. JAMES L. COBBS.

On the 1st of October, 1849, the accused was indicted for a murder alleged to have been committed on the 10th of August, 1848. The jury found him guilty of manslaughter only. *Held*: That the accused, not having been indicted within twelve months after the offence was committed, he could not be legally convicted of manslaughter.

Where a motion in arrest of judgment has been sustained, the State may appeal.

**A**PPPEAL from the District Court of Carroll. *J. N. T. Richardson, J.*

*Isaac Johnson*, Attorney General, for the State, contended: The judgment was arrested on the ground, that the indictment was not found within twelve months after the commission of the offence, and the State has appealed. The indictment was filed October 2d, 1849, and charges that defendant committed the offence on the 10th day of August, 1848.

**Art. 509 Rob. Penal Laws.** No person shall be prosecuted, tried or punished for any offence, wilful murder, arson, robbery, forgery and counterfeiting accepted, unless the indictment for the same be found or exhibited within one year next after the offence shall be done or committed.

On trials for murder, the jury may find the prisoner guilty of manslaughter, if they should be of opinion that he is not guilty of murder, but of manslaughter. Acts of 20th March, 1818. If the defendant had been indicted in direct terms for the offence of manslaughter, and a verdict of guilty had been returned, no one could question the correctness of a decision sustaining a motion in arrest of judgment, on the ground that the offence had been barred by prescription. Does not the same principle obtain when the indictment is for murder, and the verdict is manslaughter, and the facts, as to the time of committing of the offence and the finding of the indictment are as exhibited by the indictment in this case?

The latter offence is included in the former, and, under our statute, is a charge to all legal intents to be met by the defendant. The verdict of manslaughter is an acquittal of the murder; and such a verdict is proof of the fact, that the homicide was only manslaughter from its inception. In such a case, I think the plea of prescription, if true in point of fact, should prevail; otherwise, that which could not be done directly, would be sanctioned by an indirection; and the doctrine maintained, that the prescription, in this case, must be determined by the character of the offence charged, and not by the verdict of the jury.

*S. R. Walker*, for the accused, contended: The facts presented by the record in this case are, in substance, as follows: At the October term, 1849, of the Tenth Judicial District Court, holding its sessions in the parish of Tensas, the grand jury of that parish found a bill of indictment against *Cobbs* for the crime of murder, charging that the same was committed on the 10th day of August, 1848, within the jurisdiction of that court. At the October term, 1851, the case came on for trial, and the jury found a verdict, guilty of manslaughter.

Upon the finding of the jury, the prisoner's counsel moved to arrest the judgment of the court and discharge the prisoner, on the ground that the indictment was not found within a year ensuing after the commission of the crime. This motion was granted by the judge, and from this decision the district attorney appealed. Upon subsequent proceedings under a writ of *habeas corpus*, the counsel for the prisoner asked his discharge, which was refused, and he was retained in custody, upon giving bond and security in the sum of five hundred dollars.

The following points are urged upon the consideration of the court in behalf of the prisoner. 1st. Although the indictment in this case was for the crime of murder, yet the jury were permitted to find a verdict of manslaughter. B. and

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v.  
COBBE.

C. Digest, 260. The finding of the jury, and not the charge in the indictment, was conclusive of the character of the offence, and clearly brings it within the limitation of twelve months. *Ib.* p. 249, § 37. 2d. It is questioned, whether or not the State, under the facts of the case, was entitled to an appeal. The New Constitution, pointing out the appellate jurisdiction of this court, provide, that it shall be exercised in criminal cases, upon questions of law alone, whenever the punishment of death or hard labor may be inflicted, etc. Con. tit. 4, art. 63. But if the court consider this objection as not well taken, it may be asked, what can the State expect by your entertaining the appeal? This court decided, in the case of *State v. Desmond et al.*, 5th Ann. 398, "that where a prisoner was indicted for murder, and the jury found him guilty of manslaughter, (an analogous case,) upon a new trial, he cannot be again tried for murder." If this case were sent back, and an indictment for manslaughter found, the only alternative left by the decision of the court, then the limitation upon which the judgment of the court below was arrested, would with equal force apply, and the prosecution would, upon such plea, necessarily abate. Inasmuch as the appeal comprehends nothing that, in any ulterior proceedings, would vindicate the State or secure the purposes of justice, there is no reason in maintaining it. 3d. By the decision of the judge *a quo*, the prisoner was discharged, and as no showing exists in the record by which he was legally reduced again to custody, this court may presume that his present confinement is illegal and irregular. There is no order for commitment, no warrant of arrest, no legal authority to hold him in restraint, and none of the principles justifying an arrest, without these formalities can apply. The motion granting his discharge was absolute and unqualified, and placed him in the possession of his liberty as fully as an acquittal by the jury, and in the absence of any proof of regular authority to hold him in custody, this court will render a judgment that the court below should order his discharge. If the plea of a former acquittal does not apply in fact, it clearly does in spirit, and all those principles diffused throughout the body of criminal jurisprudence, regarding the sacredness of personal liberty, the jealousy with which enlightened law looks upon its slightest infringement, and the certainty and exactness required in all proceedings which deprive an individual of it, may be successfully invoked under the facts of this case.

The judgment of the court was pronounced by

PRESTON, J. The prisoner was prosecuted for the murder of *Mathew Gray*. The indictment was found by the grand jury of the parish of Tensas, on the 1st of October, 1849. The murder was charged to have been committed on the 10th day of August, 1848, or more than a year before the indictment was found. The prisoner was found guilty of manslaughter. He moved an arrest of judgment, that the bill of indictment was not found within one year after the offence was committed. The judgment was arrested, and the State has appealed.

The 37th section of the act of the Territorial Legislature, approved the 4th of May, 1805, prescribes, that "no person shall be prosecuted, tried or punished for any offence, willful murder, arson, robbery, forgery and counterfeiting excepted, unless the indictment or presentment for the same be found or exhibited within one year next after the offence shall be done or committed." B. and C. Dig.

The indictment upon which the prisoner was about to be punished was found more than a year after the offence was committed, and he was about to be punished for the offence of manslaughter, not one of the crimes excepted from the limitation by the statute. He could not, therefore, be punished for manslaughter on that indictment, and the judgment was properly arrested.

The judgment is affirmed.

## SHAPLEY OWEN v. ALEXANDER BOYD et al.

Where the matter in dispute, at the institution of the suit, does not exceed three hundred dollars, the case is not appealable to the Supreme Court, although the plaintiff may pray for interest from judicial demand.

**A** PPEAL from the District Court of Carroll, *J. N. T. Richardson, J. A. B. Caldwell*, for plaintiff. *Louis Selby*, for defendant. The judgment of the court was pronounced by

**SLIDELL, J.** The petition prays judgment against defendant and appellant, *Hood*, for three hundred dollars, and interest from judicial demand. There was judgment against *Hood*, as prayed for, and he has appealed. The motion to dismiss, must prevail. The matter in dispute, at the institution of the suit, did not exceed three hundred dollars. The case is not distinguishable from *Mason v. Oglesby*, 2d Ann. 793. See also, the cases there cited, and Constitution, art. 63. It is therefore decreed, that the appeal be dismissed at the cost of the appellant.

## THE STATE v. WILLIAM FEATHERSTON.

The Supreme Court has appellate jurisdiction in criminal cases, only where the punishment of death or hard labor in the penitentiary may be inflicted.

**A** PPEAL from the District Court of Madison, *J. N. T. Richardson, J. Isaac Johnson*, Attorney General for the State, contended: The State has appealed from a judgment of the district court, quashing an information filed by the district attorney against the defendant, for neglect to perform the duties imposed on him as a road overseer, in the parish of Madison.

A road overseer for neglect of duty, may be fined in a sum not exceeding one hundred dollars. Acts 9, 1818. Bullard and Curry, p. 740, sec. 11.

By the 63d article of the State Constitution, the Supreme Court has appellate jurisdiction in criminal cases on questions of law alone, whenever the punishment of death or hard labor may be inflicted, or when a fine exceeding three hundred dollars is actually imposed. I think, therefore, that the State is not entitled to this appeal.

*A. Snyder*, for the defendant.

The judgment of the court was pronounced by

**PARSTON, J.** The defendant having been appointed an overseer of roads in the parish of Madison, was prosecuted for neglect to perform, in that capacity, the duties imposed upon him by law. The district court, on the motion of his counsel, quashed the information, and the State has appealed.

The Constitution gives this court appellate jurisdiction "in criminal cases, on questions of law alone, whenever the punishment of death or hard labor may be inflicted, or when a fine exceeding three hundred dollars is actually imposed."

No fine at all has been imposed in the present case, and no law imposes the punishment of death or hard labor for the offence, for which the accused is prosecuted.

This court is, therefore, without jurisdiction of the case, and the appeal is dismissed.

## JOHNSON, RALPH and SLATER v. J. D. IMBODEN et al.

The plaintiffs were the sureties of an executor in the State of Arkansas. They took steps there to be relieved from their suretyship, upon which the executor placed in their hands, as an indemnity, several of the slaves belonging to the succession. He afterwards fraudulently obtained possession of the slaves, and sold them fraudulently to the defendants. *Held*: 1st. That the sureties had such a right in the property, as to maintain an action against mere spoliators. 2d. That they, also, had the right to maintain an action, as against the defendants, upon a forfeited bond for the delivery of property sequestered, although there had been administrators appointed for the succession, both in Arkansas and Louisiana.

**A** PPEAL from the District Court of Carroll, *J. N. T. Richardson, J. Clark and Wilson*, for plaintiffs. *Short and Parham*, for defendants. The judgment of the court was pronounced by

EUSTIS, C. J. A suit was instituted by the present plaintiffs against the defendant, *Imboden*, for the possession of two slaves, in which the plaintiffs recovered. The judgment was affirmed by this court, in March, 1849. The case is reported in 4th Ann. 178. The slaves had been sequestered, and the defendant, *Imboden*, bonded them. A writ of possession was issued on the judgment, for the recovery of the slaves; and on a demand for their delivery under the writ, *Imboden* failed and refused to deliver them up. The present suit is on the sequestration bond against *Imboden* and his sureties. Judgment was rendered in the court below for six hundred dollars, the value of one of the slaves, together with interest, and the defendants have appealed. The argument of the counsel for the defendant, has been principally directed against the right of the plaintiffs to maintain the present action. The same objections were made to the plaintiffs right of action in the original suit. It seems that the plaintiffs, who were the sureties of *Samuel Campbell*, in the State of Arkansas, as executor of his deceased brother, having reason to be alarmed at the mismanagement of the affairs of the succession of the deceased by the executor, applied to the court of probates, under which he was appointed, to be discharged from their suretyship. On the court taking cognizance of this application, *Campbell* delivered to the plaintiffs certain slaves belonging to the succession, for safe keeping, in order to await the action of the court upon it. From their possession, the slaves were fraudulently and forcibly taken by *Campbell*, who brought them to Louisiana, where he fraudulently transferred them to *Imboden*. The defendants having the lawful custody of the slaves, for the purpose of awaiting the future action of a court of competent jurisdiction in relation to the authority of the executor to continue to hold them, we thought had a right of action against a mere spoliator and his abettor, in which *light Campbell* and *Imboden* had placed themselves, for the purpose of restoring the property to the original deposit, in order to meet the consequences of the decision of the court of probates.

It appears, that *Cornelius Campbell* was afterwards appointed administrator of the succession of *Samuel Campbell*, in the State of Arkansas; and *Charles L. Wilson* has been appointed curator of the same succession, in the parish of Carroll, in this State, where the slaves were found. Neither of these persons have made themselves parties to this suit. It does not appear to us, that this appoint-

ment of representatives to the succession, in this State and in Arkansas, affects the right of action which the plaintiffs originally had. The recovery which the plaintiffs seek, is in the interest of the succession on which the spoliation has been committed, and also for their own benefit, and the defendants have no right to defeat it. Such a right rests, exclusively, with those who represent the succession.

It seems to us plain, that the right to maintain the present action, is a necessary consequence of the right to maintain the original action. On that point, a further examination of the subject has satisfied us of the correctness of our former decision. Storey on Bailments, § 94 *et seq.* Cases there cited.

The counsel for the defendants contends, that the sequestration bond, signed by them, is not legal, and consequently not obligatory on them. The bond recites the sequestration of the slaves, and their delivery to *Imboden* on its execution. The condition is thus stated: "the condition of the above obligation is such, that the said *Imboden* shall not send away the said property out of the jurisdiction of this court; that he shall not make an improper use of the same; and that he shall faithfully present them after definitive judgment, in case he should be decreed to restore the same to the plaintiff, otherwise the above obligation to be null and void."

This clause recites the conditions, which attach responsibility to the sureties, almost according to the letter of the Code of Practice, article 280. The condition of "otherwise the above obligation to be null and void," makes nonsense, and is evidently a blunder of the scribe, and not to be heeded as affecting the validity of the bond. Si librarius in transcribendis stipulationis verbis erravit, nihil nocere, quominus et reus et fidei jussor tenentur. De regulis juris. ff. lib. 50, *Penniman v. Barrimore*, 6 N. S. 498.

It results from the sheriff's return on the writ of possession, that the defendant, *Imboden*, did not deliver the slaves, in obedience to the judgment of the court, as he was bound to do; for which, the jury found him to be in default as to one of them, estimated at six hundred dollars. This verdict, we see no grounds for setting aside.

The judgment of the district court is therefore affirmed, with costs.

### SUCCESSION OF BENJAMIN A. STEELE.

Where the plea of *res judicata* has been made, and the judgment relied upon in support of the plea is obscure, it is competent for either party to explain it by parol or other evidence, to show that it either does, or does not, support the plea.

**A**PPPEAL from the District Court of Madison, *J. N. T. Richardson, J. Stockton and Steele*, for appellees. *A. Snyder and Bemiss*, for appellant. The judgment of the court was pronounced by

PRESTON, J. *George D. Shadburne*, curator of the succession of *Benjamin A. Steele*, has rendered his account; *David Stanbrough* opposes it, and claims to be a creditor to the amount of one thousand and fifty-three dollars, with interest at the rate of five per cent from the 22d day of April, 1848. *Price and Watson*, the only heirs of the deceased, resist his claim, on the ground, that it was a matter adjudged in his settlement of his account as tutor of the deceased. *Stanbrough*, as tutor of the deceased, rendered the final account

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of his tutorship on the 14th of April, 1849, and the judgment homologating his account, is that which is plead as adjudging this claim against him. He credited himself in the account with a sum of thirteen hundred and thirty-four dollars and seventy cents, as having paid the same to *M. Wallace, Esq.*, the attorney of *Price and Watson*, in two suits prosecuted against him. *Price and Watson* opposed this credit "as clearly unjust, except for a sum of sixty-four dollars and seventy cents, the remaining sum of twelve hundred and seventy dollars having been paid to satisfy a judgment against *D. Stanbrough*, as curator of a different succession." (Suit 1215.)

The decree of homologation in relation to this credit, is as follows: "and it is further ordered, by consent of parties, that the items number 15 and 16, amounting to the credit of \$1334 70, be withdrawn from said account, and in place thereof, the said tutor be credited with eight hundred and seventy-one dollars, being the price of the slaves, *Harriet, Lucy*, and their children, purchased by said minor, the 8th of December, 1843, and the interest accrued thereon to the death of the minor."

The money for which *Stanbrough* was accounting, was twenty-seven hundred dollars, proceeds of a tract of land which he had caused to be sold as tutor, believing it to belong exclusively to the minor. *Price and Watson* brought suit against him, and established, that one-third of the tract belonged to them, and recovered judgment for nine hundred dollars, with interest. It appears he paid them the judgment, amounting to one thousand and fifty-three dollars, and he says, with the credit which he consented to withdraw from his account as tutor of the minor. He offered to prove by the attorneys who entered the consent judgment, that in withdrawing the credit, he did not consent to its extinguishment, but reserved it as a claim against the estate of the minor, who was then deceased; but the evidence was rejected.

*Price and Watson* contends, that eight hundred and seventy-one dollars, the price paid by *Stanbrough* for slaves of his ward, was substituted in place of the credit of \$1334 70, claimed by the tutor, and that the credit was extinguished by the substitution of the other credit and judgment of homologation.

For two reasons, we think the evidence offered should have been received: First. The judgment is obscure, and we are unable to say which of the parties are right in their views of it. Second. When the plea of *rei judicate* is offered, it is legal and proper to establish, by parcel evidence or otherwise, the identity of the thing adjudged, and of course, to show in the same manner the contrary, that the thing has not been adjudged, when the obscurity in the judgment itself renders it necessary. But it is not necessary to remand the cause for this evidence. The records and accounts show precisely what *Stanbrough* received for *Price and Watson*, as heirs of their father, and also of his ward, their deceased half brother, and what he has paid to them and their creditors. He has paid three thousand seven hundred and fifty-three dollars, and received twenty-seven hundred dollars, leaving *Price and Watson*, as the only heirs of his deceased ward, indebted to him one thousand and fifty-three dollars, with interest, as claimed.

Objection is made by *Price and Watson* to several bills for counsel fees, charged by the curator of the succession. We do not see that they have taken an appeal, or brought the curator properly before us, so as to enable us to examine these claims. However, the amounts are not disputed, but it is urged, that the estate of their deceased half brother should not be charged with them. The record

shows the services, and we think they were rendered on account of him and his succession, and are proper charges against it.

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The judgment against the opponent, *David Stanbrough*, is reversed; and it is decreed, that he recover from the succession of *Benjamin Steele*, one thousand and fifty-three dollars, with interest from 22d of April, 1848, and that the succession pay the costs of this appeal. In other respects, the judgment is affirmed.

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### ISRAEL and ELIZABETH CHAMBERS v. W. N. G. WORTHAM.

Where community property has been mortgaged by a surviving partner in community, for the purpose of raising funds for the maintenance and education of the heirs, pursuant to the advice of a family meeting, which advice was concurred in by the judge of probates, and the property is afterwards sold to satisfy the mortgage, the heirs cannot reclaim it without at least affirming to refund the amount for which it was mortgaged, with interest. Informalities in a sheriff's sale, of the property of a succession, are prescribed by five years, by the act of 10th March, 1834.

APPEAL from the District Court of East Baton Rouge, *Burk, J. George S. Lacey* and *A. S. Herron*, for plaintiffs. *Cyrus Ralliff*, for defendant. The judgment of the court was pronounced by

EUSTIS, C. J. This suit is instituted for the recovery of the undivided half of certain land and slaves which the plaintiffs claim as heirs of their deceased mother. There was judgment for the defendant, and the plaintiffs have appealed.

The defendant holds under a purchase of the property at sheriff's sale, made in 1843. The property had been mortgaged to the City Bank, under a decree of the Court of Probates rendered on the advice of a family meeting, for the purpose of raising money for paying the debts of the community, and enabling the father to support and educate the plaintiffs. The decree was made as far back as 1835, and the plaintiffs have had the benefit of the money thus loaned.

In 1843, the property was sold under the mortgage, at sheriff's sale, and the defendant's vendor became the purchaser. The sale is regular, and was made under a proper order of the court.

If there were any formalities connected with the sheriff's sale, the plaintiffs' action would be prescribed by five years. Acts of 1834, p. 123.

We are surprised, that an appeal should be taken in a case of this kind, so repugnant to all ideas of justice. The community between the plaintiffs' late father and mother has never been settled, and no offer is made to restore the money which the mortgaged property has been sold to pay, and which was loaned on the faith of a decree rendered at the instance of the plaintiffs' natural tutor, in his representations that the loan was necessary for the plaintiffs' interest. The suit is without equity, and has no foundation in law.

The judgment of the district court is therefore affirmed, with costs.

**GAS LIGHT AND BANKING COMPANY v. B. HAYNES, Liquidator.**

Where a liquidator has been appointed in pursuance of law for an insolvent corporation, it is his duty to enforce contributions from stockholders who are indebted, to meet the liabilities of the corporation. Individual creditors can compel him by action to do so, and they have not the right, while he is acting, to institute suits against the stockholders to enforce the payment of their claims.

Where an insolvent corporation is in process of liquidation, in the hands of a liquidator appointed under the law, there is but little ground for considering that prescription runs in favor of the corporation, during the term of liquidation.

**A**PPEAL from the District Court of East Feliciana, *Stirling, J. E. T. Merrick*, for plaintiffs. *Z. S. Lyons*, for defendant. The judgment of the court was pronounced by

**PRESTON, J.** By the 5th section of the act passed in 1833, to incorporate the Clinton and Port Hudson Railroad Company, the president and directors were authorized to borrow money for the objects of the act, by the pledge of stock or other security, and to issue certificates or other evidence of such loans.

At the next session of the Legislature, in 1834, the capital of the company was increased five hundred thousand dollars, of which two hundred and fifty thousand dollars was to be obtained by a loan on real security, and, to secure the loan, a subscription of stock to the amount of three hundred thousand dollars was authorized. The president, directors and company, were further authorized to execute and negotiate bonds to the amount of two hundred and fifty thousand dollars, bearing five per cent interest, payable semi-annually. Bonds to the amount of seventy-five thousand dollars were made payable in eight years; seventy-five thousand dollars in fifteen years, and one hundred thousand in twenty years after date. And, to secure the capital and interest of the bonds, the subscribers to the stock were bound to give mortgages to the satisfaction of the president and directors of the company, on property to be, in all cases, equal in value to the amount of the stock respectively held by them.

In 1836, the General Assembly exonerated the New Orleans Gas Light and Banking Company, from their obligation to establish a branch of the bank at Port Hudson, in consideration of their agreeing to purchase the bonds thus to be issued by the Clinton and Port Hudson Railroad Company, and to loan the company the sum of one hundred thousand dollars, to be applied to the construction of the railroad. This arrangement was consummated by a contract between the companies, and in consideration of the loan, bonds to the amount of one hundred thousand dollars were issued, bearing six per cent interest.

The Clinton and Port Hudson Railroad Company has forfeited its charter; was put into a state of liquidation by an act approved the 26th of March, 1842, and is hopelessly insolvent.

By an act of the Legislature, approved the 21st of March, 1850, "for the further liquidation of the Clinton and Port Hudson Railroad and Banking Company," the governor was directed to appoint a liquidator, who was to continue in office three years from the date of his appointment, whose duty it shall be to liquidate the affairs of this insolvent corporation, so far as it has not already been done, as speedily as possible, in pursuance of the provisions of the act, and the



several acts in force relative to the liquidation and final settlement of insolvent corporations. He was required to call on his predecessor, and obtain from him all the books, accounts, documents, money, assets and property of every description in his possession, belonging to the company, and to make himself a party to all suits commenced by the late liquidator, or the commissioners for the collection of debts due to the corporation, or any other matter connected therewith or growing out thereof, and to prosecute the same to final settlement; and he shall file a tableau of distribution in court, once in every six months, in which he shall make a concise statement of his administration, provided he has anything to distribute among the creditors.

The plaintiffs are holders of the bonds of the company, secured by stock mortgages to the amount of two hundred and twelve thousand dollars, and of bonds given for the loan to the amount of ninety-two thousand dollars, and large arrearages of interest are due. They set out this indebtedness, and allege that there is no means of payment, except by calling upon each of the stockholders of the company for the full amount for which he has subscribed and is liable. They annex to their petition, a list of the stockholders, or their representatives, and the amount of shares subscribed by them. They allege, that they have demanded the amount of their bonds and interest; that the liquidator refuses to acknowledge their right to payment of thirty-seven bonds of a thousand dollars each, which fell due on the 1st of February, 1844, which they own and possess, and which have been presented to him for acknowledgment; that he has failed to collect amounts due by the stockholders upon their stock, or to provide in any manner for the payment of their matured bonds and interest; and they allege, that the act of the Legislature under which he was appointed is unconstitutional, and his appointment has been questioned by some persons as unconstitutional.

They therefore bring suit, and pray that *Bythel Haynes*, the liquidator, may be cited to answer their petition. They pray, that it may be held that he was constitutionally appointed liquidator of the company, or that a receiver may be appointed; that their whole debt may be acknowledged as due by the company, and particularly their bonds, which fell due on the 1st of February, 1844, with the interest; and that the liquidator or a receiver may be ordered to collect from the stockholders, or their representatives, the full amount of the stock subscribed by them, and to enforce the mortgages given by the stockholders to secure their subscriptions to the stock, and the bonds issued on the faith of those mortgages.

The liquidator admits, in his answer, that the bonds described in the petition were issued by the company; that it is insolvent, and that he has no funds to pay those obligations. He denies the liability of the company on account of those obligations, and specially pleads the prescription of five and ten years as a peremptory bar to the right of the plaintiffs to receive anything upon their obligations. He denies any right of action on the part of the plaintiffs against him as liquidator, and alleges that, in pursuance of the charter of the company, and various amendatory acts, the plaintiffs are bound to resort for payment of their bonds and interest to the individual corporators in their individual capacity.

It has not been urged by either party in this case, that the act of 1850 is unconstitutional, and we see no reason for the suggestion. The pleadings disclose a difference of opinion between the creditors of the company and its liquidator, which renders it necessary and useful that the court should decide between them. Both agree that the company is hopelessly insolvent. The record discloses that fact; and it is also matter of public notoriety, that the State has been

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subjected to the payment of its bonds, issued for the benefit of the company, to the amount of nearly half a million of dollars, with interest.

We consider, therefore, that there is the most pressing necessity to collect by suit or otherwise, all the assets of the company, with the least possible delay, and to distribute them to those to whom they are justly due.

It is plead by the liquidator, that "the plaintiffs are bound to resort to the individual corporators in their individual capacity. We decided differently last year, in the case of the same plaintiffs against *Bennett*, the liquidator being a party by intervention, and held, "that the liability of the shareholders results from a contract entered into by them with the company; and that, whenever the company or its assets are under the management of proper officers, acting for it in a corporate capacity, that contract should, in principle, be enforced through those officers; and that if the legal representatives of the company neglect to call in the debts due by the shareholders for stock, so as to enable the company to pay its debts, a creditor can compel them to enforce contribution from the shareholders according to their subscriptions."

We referred to the case of *Stark*, Receiver of the Atchafalaya Railroad and Banking Company, 5th Ann. 740, and said, in furtherance of this view, we sustained the appointment of a receiver appointed by the district court, to take charge of assets under the control of the court at the time, and belonging to an insolvent bank unrepresented, and we recognized his power to make calls upon the stockholders for contributions to pay the debts of the bank.

We adhere to these opinions, and consider it the special duty of the liquidator imposed by the act of 1850, to collect all the assets of the Clinton and Port Hudson Railroad Company, including the subscriptions of the shareholders, by suit or otherwise, as speedily as possible, and to distribute the amount collected every six months, by filing a tableau of contribution in court, to be homologated by judgment, after legal notices to the creditors. For these duties he is allowed five per cent out of these assets, which, in reality, belong to the creditors. It is not, therefore, the duty of individual creditors to collect these assets; and as a liquidator is provided by law to represent and prosecute the collective rights of the creditors, individual creditors have no right to act directly against the shareholders and debtors of the company.

It is plead and argued, that a portion of the plaintiffs' claim is prescribed. The company represented by the defendant has been insolvent and in a state of liquidation for years. There seems, therefore, but little ground for considering any part of the claim prescribed, as a suit could not properly be brought for the debt, but only steps be taken to enforce a speedy liquidation of the company by tableaux of distribution. This question will more properly arise on tableaux of distribution and contradictorily with all the creditors of the corporation.

The judgment of the district court is affirmed, with costs.

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### S. YARBOROUGH v. J. NETTLES.

Where the plaintiff claims damages for the cutting and carrying away his timber, the proper measure of his damages will be the value of the timber, and not the amount which the timber may be worth when sawed up into plank, or used in any other way.

**A** PPEAL from the District Court of East Feliciana, *Stirling, J. E. T. Mer-* YARBOROUGH  
*rick and James H. Muse*, for plaintiff. *Preston Pond*, for defendant. The  
 NETTLES.  
 judgment of the court was pronounced by

*Ross, J.* The plaintiff claims fifteen hundred dollars damages from the defendant, for having maliciously cut timber on his, the plaintiff's land, and carried away the same; there was a verdict in his favor for four hundred and fifty-two dollars; he made a motion for a new trial, which was overruled, and he has appealed from the judgment on the verdict. The defendant asks, that the judgment be amended, and either rendered entirely in his favor, or much reduced.

The jury appear to have allowed the full value of the timber, and as their verdict is conclusive on the question of malice, the only ground seriously pressed upon us, in argument for an increase of the judgment, is, that the jury should have allowed not merely the value of the timber, but its increased value when made up into lumber. If this be the rule, we are unable to perceive why the appellant should stop there, and not claim the value of the lumber when worked up in buildings or furniture; the sum allowed by the jury, will enable him to procure the same quantity of timber, and he may make upon that all the profits, which his skill and ingenuity would have enabled him to make on his own, by converting it to the uses of man. We are of opinion, that justice has been done between the parties.

Judgment affirmed, with costs.

### F. J. RATLIFF, Tutrix, v. W. B. RATLIFF, Executor.

A nuncupative will under private signature, attested by only three witnesses, when there were four persons present, and others in the vicinity who might have been obtained as subscribing witnesses, is invalid.

**A** PPEAL from the District Court of West Feliciana, *Stirling, J. U. B. Phillips*, for plaintiff.

*Brewer and Collins*, for defendant, contended: The only questions necessary to be discussed, relate to the validity of the nuncupative will, under private signature, made by *Ruffin B. Ratliff*, deceased. The will was made in the country and attested by three witnesses, residents of the parish. The Code, art. 1576, requires only three witnesses to such testaments, where the will is made in the country, and the witnesses are residents of the parish, and the provision requiring a greater number of witnesses, if they can be had, applies only when the witnesses are non-residents.

The emergency of the case rendered the presence and attestation of three witnesses sufficient. *Dr. Walker* testifies that the testator was rapidly sinking, and that he did not expect him to live through the night. If the attending physician had good reason to believe that it was unsafe to postpone the making of the will, in order to send for other witnesses, and the will was valid at the moment it was made, the fact that the testator lived two days after the execution of the will, cannot invalidate it. Reasonable diligence, and a proper exercise of judgment, is all that is required in such cases. If the will was once good, it has continued to be so.

*Robert S. Walker, Dr. Walker's* son, was present in the house, but did not sign as a witness. That fact ought not to invalidate the instrument, as he has testified to every fact that his signature could possibly have attested.

The judgment of the court was pronounced by

*Ross, J.* The plaintiff, as tutrix of her minor children, who in right of their father, are the heirs at law of *Ruffin B. Ratliff*, seeks to annul a will made by

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him in favor of the defendant, on the ground that it is a noncupative will under private signature, and is only signed by three witnesses, although a greater number might conveniently have been procured. The district judge being of opinion that the plaintiff had made out his allegations, annulled the will, and the defendant has appealed.

This case comes clearly within the principle of the decision in the case of *Fruge et al. v. Lacayl et al.*, 1 N. S. 488. That case was decided under the Old Code, but the New Code has made no change in the law, material to the present inquiry.

In this case, there were four persons in the house when the will was made, competent to sign as witnesses, and only three of them were called upon to attest it; it is also shown, that several other witnesses might have been procured within the distance of one mile, and that the testator lived two or three days after the will had been made and signed.

Judgment affirmed, with costs.

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### THE STATE v. JOHN W. HAYES et al.

Article 30 of the Constitution, providing that no person who may have been a collector of taxes, &c., shall be eligible to any office of profit or trust, until he shall have obtained a discharge for the amount of such collections, is directory, and was intended to secure what was right, and not to affect what was wrong.

Where a tax collector had obtained the assessment roll from the recorder of mortgages, for one year, without having settled for the preceding year, his sureties are not released from their liability on account of the neglect of the recorder of mortgages.

The sureties of a tax collector are bound for the penalty of two per cent per month, imposed upon defaulting tax collectors.

**A**PPPEAL from the District Court of East Feliciana, *Stirling, J. Z. S. Lyons*, District Attorney, for the State. *E. T. Merrick* and *W. D. Winter*, for defendants. The judgment of the court was pronounced by

**PRESTON, J.** At the November election, in 1848, *John W. Hayes* was elected sheriff of the parish of East Feliciana. By virtue of his office, and the 41st section of the act, approved the 3d of May, 1847, to provide a revenue for the support of the government of the State, he was collector of the State taxes; and, by the 44th section of the act, was required to give bond and security, to the satisfaction of the parish recorder, in a sum at least one-half above the amount of taxes levied for State purposes, conditioned, for the faithful performance of his duty as tax collector and for the just and full payment of all sums for which he might become legally liable.

On the 25th January, 1850, he gave bond, with *Sothey Hayes*, *Thomas Chapman* and *Franklin Hardesty*, as his sureties, in the sum of seventeen thousand eight hundred and forty-two dollars, for the faithful performance of his duties as collector for the State taxes of the parish, for the year 1849. The bond was accepted by the parish recorder, and the assessment roll was delivered to him, by the recorder, for the collection of the taxes assessed.

The taxes amounted for the year, to \$11,394 42. The sheriff accounted to the auditor of the State for \$2,068 25, leaving a balance due of \$9,825 77, which has been placed by the auditor of public accounts in the hands of the district attorney, of the district in which the parish is situated, for suit, in pursuance of the 62d section of the act, approved the 21st March, 1850, p. 144.

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It is to be observed, that this act contains a complete system for the assessment and collection of taxes, and repeals all laws on the subjects of which it treats. It was passed, however, subsequently to the obligations incurred and delinquencies complained of in this suit; and, therefore, can have no effect upon them, except as to the remedy provided in the section just quoted. Those obligations and delinquencies, must be governed by the act, approved the 3d of May, 1847, p. 164, as amended by the act, approved the 20th of December, 1848, except as to the remedy of the State, because they occurred under those acts.

The district attorney has brought the suit against the sheriff and his sureties, for the amount of the defalcation; and in pursuance of the 15th section of the act of 1848, already quoted, for two per cent interest per month, on the amount of the defalcation, until it shall be settled and paid.

The sheriff made no defence, and judgment has been rendered against him for the amount claimed, and two per cent interest per month, until paid.

The sureties admit that they signed the bond, but deny every thing else material to render them liable. And, as a special defence, aver, that they incurred no liability by signing the bond, for the following, among other reasons: that at the time of signing the bond, and the delivery of the assessment roll to their principal, *John W. Hayes*, he was incapable, under the law, of receiving the same and collecting the taxes, having failed to procure from the State treasurer, or other proper officer, his receipt for all taxes and public moneys collected by him in the year 1844, of which he was also the collector; and upon which, he was then in arrears in at least the sum of ten thousand dollars. They aver, further, that this fact was concealed from them, and that the bond was signed by them in error, under the belief that the recorder had complied with the law, and exacted from *Hayes* the receipt, or quietus, for his liability on the roll of 1848, before delivering to him the roll of 1849; and that, had they been aware that the recorder, acting for the State, had neglected to require the receipt or quietus, they would have utterly refused to sign the bond for 1849.

They averred further, that the amount then unpaid upon the tax roll of 1848, was, at least, ten thousand dollars; which amount, they allege, was subsequently paid up by *Hayes*, from collections upon the roll of 1849, thus illegally placed in his hands.

A verdict and judgment was rendered in favor of the sureties, and the State has appealed. The defalcation of the sheriff, to the amount of \$9,825 77, has been fully established by the evidence, and it therefore becomes necessary to examine these special defences set up by his sureties.

The 30th article of the Constitution of the State provides, "that no person, who, at any time, may have been a collector of taxes, or who may have been otherwise entrusted with public money, shall be eligible to the general assembly, or to any office of profit or trust under the State government, until he shall have obtained a discharge for the amount of such collections, and for all public moneys with which he may have been entrusted."

No law was passed until 1850, for carrying into effect this article of the Constitution. The acts of 1847 and 1848, were somewhat calculated to mislead as to the mode of carrying it into effect as to sheriffs, as this case illustrates. The sheriff was re-elected in the month of November, 1849, but had, by the 62d section of the act of 1847 as amended by the 14th section of the act of 1848, until the 1st of March, 1850, to settle his accounts and make his final payments into the treasury, and to obtain his discharge. When elected, therefore, he was eligible. His commission, as sheriff, entitled him to the assessment roll as col-

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lector of taxes, in pursuance of the 41st section of the act of 1847; and it could not be withheld from him as a defaulter, because, as we have seen, he could not be required to make a final settlement and obtain his discharge for the taxes of 1848, until the 1st of March, 1850.

At this date, the sheriff's bond had been executed, and the assessment roll of 1849, delivered to him. There was no express law requiring the recorder to withhold it until after the 1st of March, 1850, and the production of the treasurer's discharge.

By a very forced inference, it is contended that the recorder should have exercised the powers conferred upon the former parish court, in this respect, by the 6th section of an act, approved the 25th of March, 1813. Admitting that he might have taken the responsibility of withholding the assessment roll until the 1st of March, 1850, under this law, or have enforced the provision of the Constitution *propria vigore*, that he was the proper officer to do so, and neglected his duty in not doing it; of what avail is all this to the sureties of the sheriff?

He had just been reflected. It was their duty as citizens, and much more as persons about to obligate themselves for his future faithful conduct, to have inquired how he had previously discharged the duties of his office; and, above all, to have required from him the exhibition of his discharge for all public moneys previously collected, which the Constitution enjoined him to have in his possession and to produce, before commencing the collection and receipt of other public money. If the recorder neglected his duty, as contended, the sureties of the sheriff cannot successfully urge the neglect of this officer to perform his duty, as their exoneration for the misconduct of the officer for whom they became responsible. For his fidelity in 1850, they made themselves responsible, and the only material question between them and the State is, did he faithfully collect and pay over the taxes of 1849? We cannot conceive, that the neglect of one set of officers to do their duties, should exonerate the sureties of another officer for his failure to do his duty. His duty was independent of theirs, and existed, although theirs may not have been performed.

By signing the bond, the sureties enabled the sheriff to obtain the assessment roll of 1849, and thus to violate the duties, for the faithful performance of which, the sureties had made themselves responsible. There would be just as much reason for exonerating his sureties on the sheriff's bond from liability for money collected under executions, and not paid over, as to exonerate these sureties on his bond as tax collector. The provision in the Constitution is directory, to guard and not destroy the office; to secure what is right, not to affect what is wrong. For similar reasons, the sureties cannot be exonerated on the ground of error in signing the bond. The error supposed is, that they believed their principal had obtained his discharge for the collection of the taxes for the preceding years. We have seen, that he was not bound to obtain his discharge for the taxes of 1848, until the 1st of March, 1850. If the error complained of is based on the fact, that he had not paid over taxes actually collected, they were bound to make inquiry on that subject; and interested more than any other persons in the knowledge that error cannot be plead successfully as to a fact, the party was bound to know himself.

In these views, we are well supported by authority. The 6th section of an act, approved the 25th of March, 1813, provided, that "at the end of every year, for the collection of taxes, all sheriffs shall enter into a new bond, agreeably to the rules and regulations provided by the act; provided, however, that no sheriff shall be suffered, at the end of any year, to renew his bond, until he shall pre-

duce to the court the treasurer's receipt for all taxes and public monies which he may be bound to collect for the preceding year. In the case of *Police Jury of St. Landry v. Haw*, 2 L. R. 42, the sureties defended themselves, on the ground, that the sheriff was not authorized to collect the taxes, he not having produced the treasurer's receipt for the payment of the taxes of the preceding year, before renewing his bond, and that, therefore, it was a legal impossibility for him to execute a valid bond; and that their contract of suretyship was void on account of error, because they signed the bond in good faith, and were in utter ignorance that the requisites of law had not been complied with by their principal and the court. But the Supreme Court, through their organ, Mathews, J. held, that their principal was sheriff *de facto*, if not *de jure*; and, as such, was acknowledged by his sureties in assuming that situation, by signing the instrument of writing, wherein they took upon themselves the obligation resulting from their agreement, and should not now be permitted to deny the capacity of their principal thus acknowledged.

The same principle, substantially, was maintained by the Supreme Court, at a later period, in the case of the *Mayor and Aldermen of the City v. The Sureties of Blache, City Treasurer*. Analogous principles were recognized by this court, in the case of the *Louisiana State Bank v. Ledour*, 3d Ann. 675.

So, the 4th section of an act of Congress, approved the 24th April, 1816, required the paymaster general of the army to recall a delinquent paymaster. It was not done; but more funds were placed in his hands after the delinquency. He failed to account for them, and his sureties were sued by the United States for the amount of the defalcation. They obtained the opinion of the circuit court and verdict of a jury in their favor, as in the present case, but the judgment was reversed by the Supreme Court of the United States, for reasons similar to those we have given. *The United States v. Vanzandt*, 11 Wheat. R. 184.

The verdict and judgment in this case, is erroneous in principle, and would lead to very great irresponsibility on the part of public officers and their sureties, if sanctioned by this court, and consequent deficiency in the public revenue. Interest might probably have been claimed from the date of the defalcation; but interest having been allowed against the principal, only from the judicial demand, the sureties should not be held responsible for more.

It is rendered probable by the evidence, as plead by the defendants, that the sheriff paid some part of the taxes collected for 1849, on his account for 1848. The amount is very uncertain, and is immaterial. For it was his duty to have paid the money, collected from the taxes of 1849, into the treasury, on account of that year. The disposition of it, alleged by the defendants, was as much a misappropriation as if he had used it in the payment of his private debts.

It is lastly urged, that the sureties are not liable for interest at the rate of two per cent a month on the amount of the defalcation, because that is a penalty imposed upon the defaulter. We think it an obligation contracted by the sheriff for his failure to pay over the taxes collected, and that the sureties are liable for all his obligations. The interest is imposed by the 15th section of the act of the 20th of December, 1848, p. 40. The obscurity of the English text, which probably lead the counsel into error, is to be explained by the French text.

The judgment of the district court is reversed; and it is decreed, that the plaintiff recover from the defendants *in solido*, the sum of nine thousand eight

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hundred and twenty-five dollars and seventy cents, with interest at the rate of two per cent a month from the date of the judgment against the principals, until paid, and costs in both cases.

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THE STATE v. WILLIAM H. GLASS.

The judge has the right, and it is his duty, to explain to the jury what constitutes the crime charged against the accused; and, on an indictment for carrying on a banking game, he may explain to the jury what constitutes a banking game.

The fact that an incompetent juror sat upon the trial without being challenged, is not a good ground for a motion in arrest of judgment.

The incompetency of a juror, unless he has been challenged, is not a good ground for a new trial.

A prisoner cannot be allowed to take the chance of a verdict in his favor, and when rendered against him, successfully attack it for facts known to him before the trial.

**A** PPEAL from the District Court of West Feliciana, *Stirling, J. Z. S. Lyons*, District Attorney, for the State. *C. Ratliff*, for appellant. The judgment of the court was pronounced by

**PRESTON, J.** The defendant was indicted for keeping a banking house and banking game; was convicted and sentenced to pay a fine of a thousand dollars, and has appealed.

He applied for a new trial, on the ground, that the judge, in his charge to the jury, gave his opinion as to what constituted a banking house and banking game, under the act to suppress gambling. No bill of exceptions was taken to the charge, but the district attorney admits that the judge charged as stated. The judge had a right to do so; nay, it was his duty on the trial of this case, as in all others, to explain to the jury what constitutes the crime charged. It does not appear that he improperly interfered with the acknowledged power of the jury to render a general verdict in the case.

It was moved in arrest of judgment, that one *Benjamin* was empannelled with, and sworn on the petty jury, although he was convicted of a crime and had been sentenced to imprisonment in the penitentiary, from which judgment, however, he had appealed to this court. This should have been offered as a ground in support of the application for a new trial, and not as a reason to arrest the judgment. The district attorney, however, admits the facts, with this qualification, that the conviction of the juror was known to the accused in this case, because the juror had been defended by the counsel in the present case. The facts being admitted, we are, perhaps, bound to inquire into their effect as though they had been presented on the application for a new trial.

We have often held, that the incompetency or disqualification of a juror is not a good ground for a new trial, unless challenged when brought to the box to be sworn. A prisoner cannot be allowed to take the chance of a verdict in his favor, and when rendered against him, successfully attack it for facts known to him before the trial.

Other matters have been the subject of discussion before this court in the case, but the record presents nothing further for our consideration.

The judgment of the district court is affirmed, with costs.



WRIGHT, WILLIAMS & Co. v. THE TRUSTEES OF THE BANK  
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Where property has been sold under execution to pay mortgage debts, the mortgages upon the property to which the price was to be applied, are extinguished so far as the property is concerned, and the rights of parties are transferred to the funds. It is not therefore necessary to reinscribe the mortgages to prevent their inscription being barred by ten years' prescription.

**A**PPEAL from the District Court of Concordia, *Farrar, J. H. B. Shaw*, for appellees. *Stacy & Sparrow*, for appellants. The judgment of the court was pronounced by

**EVERTS, C. J.** This appeal is taken by the trustees of the late Bank of the United States and other parties, from a judgment of the Court of the Ninth District, sitting in the parish of Concordia, by which a portion of the proceeds of a sale of the Marengo plantation and slaves was ordered to be paid to the appellees, *Wright, Williams & Co.*, of New Orleans, in preference to other creditors.

The appellees were subrogated to a judgment rendered in favor of *The Mechanics and Traders' Bank of New Orleans v. Charles N. Rowley and wife*. This judgment was founded upon a mortgage debt contracted by the defendants; the mortgage was recorded in March, 1840; it bore upon the plantation and slaves, the proceeds of which give rise to the present litigation, and has never been reinscribed. The property mortgaged was seized and sold at the instance of *Daniel W. Coxe*, a creditor, whose claim took precedence of the mortgage of the appellees; the proceeds of the sale having been applied to the extinguishment of *Coxe's* mortgage, and another mortgage which also had a precedence over that of the appellees, a balance remained in the hands of the sheriff, which was adjudged to the appellees.

The contest before us is between the appellees and the Trustees of the Bank of the United States, the latter claiming precedence of a mortgage in favor of the Bank of the United States, recorded on the 24th of December, 1840, and reinscribed on the 2d of January, 1850.

The proceeds of the mortgaged property were paid to the sheriff by *Hoover*, the purchaser at sheriff's sale, who bought the property on twelve months' credit, on the 7th of August, 1847.

On the 24th of July, 1848, an opposition to the distribution of the proceeds of the property sold, was made by the Trustees of the Bank, in which they asked that *Hoover* should be notified not to pay any portion of the price of his purchase to any person except to the sheriff of the parish of Concordia, with the exception of the amount due on the *Coxe* mortgage; and at their instance, an order of court was granted, by which the sheriff was directed, after deducting the amount due *Coxe* and the other mortgage creditor having precedence, to retain in his hands, subject to the future order of the court, the proceeds of two-thirds of the Marengo plantation sold by him.

It is now contended, that the sheriff had no right to receive the amount of the purchase money from *Hoover*; that *Hoover* was bound to retain in his

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hands the balance, after satisfying the execution under which the sale was made, and that the payment to the sheriff must be considered as not having been made. The case of *Scott v. Featherston*, 5th Ann. 312, is referred to, as sustaining these positions. We are of opinion, that by the judicial proceedings of the trustees just recited, they are estopped from questioning the validity of *Hoover's* payment, and that good faith requires that the proceeds of the mortgaged property should be considered as subject to the control and direction of the court, in conformity with the order which was granted in the premises at their instance.

If the payment of the price of the property sold is a valid payment, it follows, of course, that the mortgages upon the property to which the price was of right to be applied, were extinguished, so far as the property is concerned, and that the rights of the parties were transferred from the property to the proceeds.

The object of the recording of mortgages is to give notice of the incumbrances on real property and slaves. There is no reason in recording a mortgage for the purpose of reaching money in the hands of a sheriff under execution, or held for distribution under an order of court. A mortgage for such a purpose, has no place in a record of mortgages, and we are not aware of any principle of law, by which any such effect can be given to it. The time when *Hoover* made his payment, was within ten years from the date of the inscription of the mortgage of the appellees. This gives it precedence over the mortgage of the Bank of the United States.

The other points made by the counsel for the trustees, we have considered, without being able to concur with the counsel as to their validity.

The judgment of the district court is therefore affirmed, with costs.

### JAMES BECK & Co. v. THOMAS BRADY et al.

It is out of the usual course of business, and unlawful, for an insolvent merchant to sell his whole stock of goods on long credits, and without any security, to a purchaser who knew the state of his affairs.

**A**PPEAL from the Second District Court of New Orleans, *Lea, J. Benjamin and Micou*, for plaintiffs. *C. Roselius, C. Maurian and Tissot*, for defendants. The judgment of the court was pronounced by

PRESTON, J. This is a suit to annul the sale of a stock of dry goods made by *Thomas Brady* to *H. E. Brown*, on the ground that it was simulated and made to defraud the plaintiffs and other creditors of *Brady*, and to subject the goods to the payment of the plaintiffs' claim for upwards of nine thousand dollars, for which they have obtained judgment. The case presents questions of fact alone, and the simulation and fraud was made out so fully to the mind of the district judge, that he felt himself justified in denouncing it in the strongest possible terms.

Simulation and fraud, unfortunately for society, are so common and have become so frequently the subjects of investigation in our courts, and are so difficult of discovery, that when ferreted out by the district courts with great care and labor, we are unwilling to interfere with their judgments, unless there be

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manifest want of evidence. So far from that being the fact in the present case, the evidence leads us to the same conclusions with the district court.

We have examined the voluminous record minutely, but will only state the results of that examination.

The defendant, *Brady*, was a resident of the city of New York, but for two years carried on a dry goods store in this city, and also the business of selling goods by the package at auction. On the 31st of January, 1851, he purports, by a notarial act, to have sold out his whole stock to the defendant, *H. E. Brown*, for about \$45,000, payable \$2000 in cash, and the balance at six, twelve, eighteen, twenty-four, thirty and thirty-six months' credit, in notes of the purchaser, bearing six per cent interest.

The next day he gave a statement of his affairs to an attorney at law, showing liabilities to the amount of near two hundred thousand dollars, and assets, including the unendorsed notes for the stock of goods, amounting to less in value than \$50,000, with which to pay his debts, or about twenty-five per cent of their amount. He gave a power of attorney to the attorney, to tender these assets to the creditors, evidently with a view to induce the creditors to take these assets in discharge of his liabilities. He left the city, and it does not appear that he has ever returned. The plaintiffs, regarding the sale as a fraudulent simulation, disregarded it, and attached the stock of goods in the possession of *Brown*.

The evidence leaves no doubt that this was a fraudulent transaction on the part of *Brady*. He was insolvent to an immense amount, being unable, according to his own showing, to pay more than one-fourth of his vast debt. It was his duty, under the circumstances, to have surrendered his little property, which was the common pledge of his creditors, to them, to be administered and distributed among them according to law; and further, to have remained personally and given them a satisfactory account of the loss of a hundred and fifty thousand dollars of their property, in the short space of two years. Even a month before the sale, the stock of merchandise exceeded the price for which it was sold, by upwards of thirty thousand dollars, of which diminution no satisfactory account is given.

It was the duty of *Brady* to have enabled his creditors, after causing them such enormous losses, to have realized the remaining assets, as soon as possible, in cash, and not to have forced upon them, instead of a remnant of property, a new debtor at long terms of credit, and which debtor, it seems from the evidence, had no means to purchase. For it appears from the answers of the attorney who was to make the arrangements with the creditors, most of whom were in New York and Boston, that within twenty days after he received the power of attorney, he had no part of either the money or notes given for the stock of goods, and it does not appear in evidence, that he ever had them in possession.

We believe that *Brown* knew at the time of the purchase of the stock of goods, that the vendor was totally insolvent. Through his agency, the store had been established, and he had been his confidential clerk and manager of the business in this city; and, as such, we have no doubt, knew *Brady's* situation. As such he knew, or was bound to have known, the duties of the insolvent by the laws of Louisiana, as already stated, and to have aided him in performing them. On the contrary, he cooperated with him in violating those duties, by pretending to purchase his stock of goods and giving him the money and notes which he might, and probably has, disposed of to the further and total loss of the creditors.

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It was out of the usual course of business, and unlawful, for an insolvent to sell his whole stock of goods on long credits, and without any security from the purchaser; and *Brown* aided in this unlawful conduct.

*Brown* was insolvent himself, and even the cash payment for the stock of goods was borrowed from the auctioneer of *Brady*, and returned in a few days, no doubt out of the proceeds of the forced sale and sacrifice of that very stock which should have been most carefully husbanded for the creditors, to whom it in reality belonged. He purchased the stock with no intention of carrying on business as a dry goods merchant, but immediately commenced the sacrifice of the property at such prices for cash, as produced such a rush on the store as compelled him and his clerks, at one time, to barricade the doors.

The whole affair was as unusual, anti-commercial and fraudulent on the part of *Brown* as of *Brady*. The district judge regarded the whole as a mere simulation to cover a division of the spoils, and maintained the attachment; and we see no reason to pronounce that he erred.

The judgment of the district court is affirmed, with costs.

### JAMES A. SEDDAN v. SAMUEL TEMPLETON.

Until final judgment, confirming a judgment by default, has been entered on the minutes of the court, the defendant has a right to move to set aside the judgment by default, and to file an answer.

ON an application for a *mandamus* to the judge of the District Court of Carroll, *J. N. T. Richardson, J. R. H. Marr*, for applicant. The judgment of the court was pronounced by

SLIDELL, J. This is an application by the plaintiff in a cause pending in the District Court of the Parish of Carroll. The applicant prays this court to grant a *mandamus* to the district judge, "ordering him to sign the judgment rendered in this cause, and to have said judgment entered on the minutes of the court; which said judge has refused to do."

A transcript of the record of the proceedings in the court below, is before us. It appears that a judgment by default was entered against *Templeton* at the May term, 1851; that at the November term, the plaintiff offered evidence, for the purpose of obtaining a final judgment; that the judge had orally expressed his satisfaction with the evidence, and told the plaintiff's attorney to take a judgment. But before a final judgment was entered on the minutes, and before the court had ordered the clerk to make any such entry on his minutes, the defendant's attorney requested a suspension of the proceedings, until he could see his client. No entry of final judgment has ever been made upon the minutes of the court. On the contrary, at a subsequent day of the same term, upon filing an affidavit and a prayer for further time, the defendant obtained an order, allowing him until the first day of the next term of the court, to file an answer.

Here was a mere judgment by default. Until final or confirmatory judgment, duly entered of record, the defendant had a right to move the court for leave to set aside the default and file an answer. Whether further time should be allowed him to answer under the peculiar circumstances stated in the affidavit, was a matter for the sound discretion of the district judge. In all kindred

matters, which merely involve a delay of the cause, a discretion is vested in the district judge. If this court can interfere at all in such matters, it can, certainly, properly interfere only where there is a clear abuse of the discretion, tending to create a manifest failure of justice, and permanently frustrate the right of a litigant to have his cause placed in such a condition, as to enable him to have the benefit of the appellate jurisdiction, which the Constitution has conferred upon this court.

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This court has, unquestionably, the power to award the writ of *mandamus* in causes which fall within its appellate jurisdiction, and in the necessary maintenance of that jurisdiction. But it is a power which we very rarely exercise, as the records of this court will show.

There is no sufficient ground for the interference of the court in the case at bar. The application is therefore dismissed, at the costs of the applicant.

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### SUCCESSION OF JOHN C. BOONE.

The testamentary executrix who is in possession of the succession, is not under the necessity of demanding the seisin of a particular legacy to herself from the heirs. Where two clauses in a will are inconsistent, the latter is considered as the will of the testator. C. C. 1716.

**A**PPEAL from the District Court of West Feliciana, *Stirling, J. U. B. Phillips*, for appellee. *C. Ratliff*, for appellant. The judgment of the court was pronounced by

ROST, J. This is an appeal by the heirs of *John C. Boone*, from a judgment on the oppositions to the account filed by his widow and executrix. The only two items of the account seriously contested on the appeal, are a charge made by the executrix for the rent of lands and buildings leased by her to the succession, and the amount paid for counsel's fees.

The will of the testator commences by the following disposition: "It is my will and request, that all of my property, not herein disposed of by particular legacy, shall remain in the possession, and under the administration of my beloved wife, and partner in the community now subsisting between me and my said wife, until the first day of January, 1855; after that period, to be divided and partitioned amongst my legal heirs, as hereinafter directed; but such division is not intended to operate to the prejudice of any particular legacy herein bequeathed, to any heir or legatee."

He then goes on to make a large number of legacies of land and slaves, among which is the following: "To my beloved wife, *Nancy Fegucy Boone*, I give and bequeath the Home place or plantation, containing one thousand arpents, and known by us as the *Zadcock Brashier* grant, together with the household furniture, stock, farming utensils, and the improvements thereon and thereunto belonging; also, the following slaves, to wit: *Kentucky Jim*, the carriage driver, and his wife *Mary*, and her daughter *Rody*; *Susan*, the cook; the washerwoman, *Sarah*; and the seamstress, *Molly*; to have and to hold the same unto her, the said *Nancy Fugucy Boone*, her heirs and assigns, to her own proper use and benefit, for ever."

**SUCCESSION OF BOONE.** It is shown that the testator cultivated, at the time of his death, part of the Brashier tract of land, and another large tract adjoining it; and that all the plantation buildings, except one of the gin-houses, were on the Brashier tract.

The two tracts have continued to be cultivated as they were before the death of the testator, and the executrix claims rent for her land and buildings, on the ground that the bequest to her, being a particular legacy, she was entitled to take possession at once; that being an executrix with the seizin, she was not bound to demand the delivery from the heirs, and that she has been in possession in her own right, ever since she was qualified as executrix.

The heirs of *Boone*, on the other hand, contend, that the legacy to the executrix was only intended to take effect in 1855; and, if mistaken in this, they urge, that the executrix having failed to make a demand from the heirs, she has no claim for the fruits; they also deny the power of the executrix, to create obligations in her own favor, as she has attempted to do.

The district judge considered the claim of the executrix well founded, but considering that the succession had claims against her for improvements made upon her land, and also for negro hire, which she had failed to allow, and the amount of which was not satisfactorily shown, he ordered her claim to be stricken from the account, reserving the rights of the parties in relation to it. The opponents have appealed.

The legacy made to the executrix, is of the same character as all the others contained in the will, and is, in every respect, a particular legacy within the meaning of the exception in the will. As testamentary executrix, she was dispensed by law from the formality of demanding the delivery from the heirs, and the district judge was authorized to consider her in possession as owner.

We perceive no inconsistency or contradiction in the two dispositions of the will which we have quoted. The testator gave away a good many of his slaves, and his intention was, no doubt, that those which were to be kept together until 1855, should cultivate the tract of land adjoining the Brashier tract. There was a gin-house upon it, and other plantation buildings might easily have been erected. Whether the executrix acted for the interest of the estate, in using those upon her land instead of building others, and the extent to which the succession was benefited, by this and the cultivation of the Brashier tract, will be a matter for future investigation.

If it was true that the two dispositions of the will are contradictory, the particular legacy was last written, and under an express provision of the code, must be presumed to be the will of the testator. If he had disposed of all his property by private bequests, the first disposition would have been entirely inoperative. Civil Code, 1716.

A careful perusal of the evidence, and of the proceedings had in the succession, has satisfied us that the amount paid for counsel fees is reasonable; we can discover no error in the judgment.

Judgment affirmed, with costs.

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## THE COMMERCIAL BANK OF N. ORLEANS v. JOHN ROUTH et al.

An endorsement of a note executed by an attorney duly authorized, is binding on the principal.

Notice of protest addressed to the post office where the endorser usually receives his letters is sufficient.

If the second of exchange be accepted, the holder may recover judgment on it, without accounting for the first of exchange.

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**A**PPEAL from the District Court of Concordia, *Wilson, J. L. Janin*, for plaintiffs. *Stacy and Sparrow*, for defendants. Judgment of the late Supreme Court:

"This action is brought upon a protested bill of exchange for \$10,876 28, drawn at Natchez on the 25th of June, 1838, by *Shipp, Ferriday & Co.*, on *Bullitt, Shipp & Co.* of New Orleans, payable eight months after date, accepted by the drawees, and endorsed by *John Routh* and *Austin Williams*, the payees and defendants; these endorsements purport to be made by *William Ferriday*, as their attorney in fact. There was a judgment of nonsuit below, from which the plaintiffs have appealed.

The only questions which the case presents are: 1st. Whether the defendants had authorized *William Ferriday* to bind them as endorsers on this bill? 2d. Whether they have been legally notified of its protest? 3d. Whether the plaintiffs can recover upon the second of a set of exchange, without accounting for the first?

I. The record shows that on the 28th and 29th of November, 1837, *Williams* and *Routh* executed special and separate powers of attorney to *William Ferriday*, of the city of Natchez, giving him the most extensive powers, and among others, "full power and authority for them, and in their name, or in the name and for the use and benefit of him, their said attorney, or for the use and benefit of, or in the name or names of any other person or persons whatsoever, to make, endorse, draw, accept, and negotiate all promissory notes, bills of exchange, drafts, and other securities, of any and every kind whatsoever," &c. These powers were acknowledged before *William Poindexter*, a notary in the parish of Concordia, who gave up the original acts, which, on the 2d of December, 1837, were deposited by *William Ferriday* in the office of *H. B. Cenas*, a notary public in New Orleans, who had them bound up in his notarial records. Copies of these powers, certified by *H. B. Cenas*, were annexed to the petition, and interrogatories were propounded by the plaintiffs to each of the defendants, to the following effect, to wit: 1. "Is not the endorsement of your name on the bill of exchange described in and annexed to the foregoing petition, in the hand-writing of *William Ferriday*, and was not the same *William Ferriday* duly authorized and empowered by you to make said endorsement?" 2. "Did you not, in November, 1837, at Concordia, execute and sign your within power of attorney to the said *William Ferriday*, in presence of witnesses and of *William L. Poindexter*, notary public; and was not said power of attorney deposited by the said *William Ferriday*, by an authentic act of deposit, in the office of *Hilary B. Cenas*, notary public, at New Orleans, dated December 2d, 1837; and does not the annexed copy of said act of deposit of the document deposited, contain a true copy of the power of attorney granted by you to the said *William Ferriday*, in November, 1837?"

These interrogatories were no doubt propounded from an apprehension that the judge below might, as he did on the trial, and properly too, refuse to receive in evidence, copies that were not certified by the notary before whom the acts were passed, or by a power who was not the legal custodian of them, or authorized by law to give copies. L. C., art. 2247. In answer to the first interro-

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gatory, *Austin Williams* said, that the endorsement of his name on the bill sued on, was in the hand-writing of *William Ferriday*, and proceeded thus: "Whether he was or not duly authorized by me to make said endorsement, is a legal question arising out of the construction of the power of attorney annexed to plaintiffs' petition, which I do not feel myself competent to decide."

To the second interrogatory, he answered: "I did in November, 1837, I believe, execute a power of attorney to *William Ferriday*, as stated in the plaintiffs' interrogatory, but do not know whether it was or not deposited in the office of *Hilary Cenas*, a notary public in New Orleans. I have not the original power of attorney, and cannot say whether the copy annexed to plaintiffs' petition is true or not."

There is an admission in the record, that *John Routh* would make to the first interrogatory the same answer as *Austin Williams* and that he would answer the second interrogatory in the affirmative.

The district judge considered the answers of *Austin Williams* as insufficient to prove that he had authorized *William Ferriday* to make the endorsement on the bill sued on, or to establish the genuineness of the power of attorney of which a copy was annexed to the petition; under this view of the effect of these answers, he excluded, as to *Austin Williams*, all the evidence offered by the plaintiffs to make out their case against him, but admitted it as to his codefendant, *Routh*.

We think that the judge erred. The answer of the defendant, *Williams*, to the first interrogatory, is not that explicit and categorical answer required by law. When a party's conscience is appealed to, he shall not be permitted to screen himself behind evasive answers and technicalities. The great advantage which such a proceeding gives him in establishing his defence, imposes upon him the corresponding obligation of answering fairly and directly. The question put to him was, whether he had authorized *William Ferriday* to make the endorsement sued on. Instead of answering that he did or did not so authorize him, he states that this fact, upon which he is required to answer and which is within his own knowledge, must depend upon the construction to be given to the power of attorney annexed to the plaintiffs' petition. Such a manifest evasion to answer a plain and direct question, might alone authorize us to consider the fact as confessed; but taking the answer as it is, it at least implies and admits the accuracy of the copy and the verity of the original power of attorney, which his codefendant admitted in a more fair and candid manner. The powers of attorney which are annexed to the petition, are moreover proven by *William L. Poindexter*, to have been the only powers executed before him by the defendants; he states that he gave up the originals, which he has since seen in the notarial records of *Cenas*, from which they could not be withdrawn, and that he compared these identical copies with the originals before they were sent up from New Orleans, and found them correct. Upon the whole, we are of opinion that the powers under which *William Ferriday* acted, are sufficiently proved, and that they were amply sufficient to authorize him to make the endorsements sued on.

II. On the day of its maturity, the bill was duly protested, and notice of protest was given by the notary of the bank to the defendants, in two letters written to each of them by that officer, and put into the post office of New Orleans: one of them was addressed to Natchez, Mississippi, the other to the "Parish of Concordia."



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It is shown, that both *Routh* and *Williams* are residents of the Parish of Concordia; that during the winter, spring and fall months, they live on their plantations on Lake St. Joseph, and near Natchez in the summer; that in 1838 and 1839, there was no post office in that parish, the inhabitants of which received their letters through post offices in Mississippi, on the other side of the river, Fort Adams, Natchez, Rodney, or Grand Gulf; that the Parish of Concordia, as then constituted, was 135 to 140 miles in length, and Natchez nearly opposite the centre of the parish. Several witnesses of the defendants state, that their residence is only six or eight miles from Grand Gulf, while it is from fifty-five to sixty from Natchez; that Grand Gulf and Rodney are nearer to the majority of the population of Concordia, than Natchez; and that letters addressed to them through the Grand Gulf post office, were received by them. On the other hand, *Lafferandine*, for many years a clerk in the New Orleans post office, testifies, that letters simply directed to the Parish of Concordia, are always forwarded by that post office to Natchez. *Woodson Wren*, who was post master of Natchez in 1839, says, that the Natchez post office is the nearest to the majority of the people, and where the greater part of the inhabitants of Concordia received their letters during the years 1828 and 1839; that there was no post office in Concordia in those years, and the nearest one on the Mississippi side was Rodney, but Natchez was the most convenient and central one for the Parish of Concordia, the most business place, and the one of greatest resort. He further states, that both the defendants have been in the habit of receiving their letters from the post office at Natchez for the last seven years; that *John Routh* had a box at the Natchez post office, in which his letters were deposited, by his request, during the years 1838 and 1839, but that he does not recollect if *Williams* had a box. We have often held, that when it is shown that an endorser habitually receives his letters through the more distant post office, a notice given through it is good. *Bank of Louisiana v. Watson*, 15 L. R. 41. *Union Bank of Louisiana v. Brown*, 1 L. R. 107; and the cases of *Mead v. Carnal*, and *The Mechanics and Traders' Bank v. Jameson, Dir & Co.*, decided at this term.

But even could there be any doubt as to the sufficiency of these notices, we think that those addressed to them "at the Parish of Concordia," in pursuance of the provisions of the act of 1827, are good. As we said in the case of *Duncan v. Sparrow*, 3 R. R. 166, this statute requires two formalities: 1st, that the notice should be put into the nearest post office where the protest is made; and, 2dly, that such notice should be addressed to the endorser at his domicile, or usual place of residence. These requirements of the law have been complied with. But it is urged, that the direction "to the Parish of Concordia," is entirely too vague, when it is recollected that in 1839, the length of the parish was one hundred and forty miles; this would be true, if there had been any post office in the parish near the residence of the defendants, or if they had lived in any town or village of the parish. 16 L. R. 20. But there being no post office there, it was impossible to direct the notices otherwise than simply to the Parish of Concordia; had they been directed to Grand Gulf or Rodney, however near to *Routh* or *Williams'* houses, those places were not their residence or usual place of domicile, for they are in a different State; so, in the case of *Duncan v. Sparrow*, the notice was held to be bad, although directed to him at Natchez, the nearest post office to his residence, and that through which he received his letters, because it was not addressed to the place of his residence, "the Parish of Concordia." L. C. art. 42.

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III. To provide against losses and accidents, a set of two or more bills of exchange are usually made out, but provision is made on the face of each bill, that it shall be paid only in case the others are unpaid. It is not to be presumed that a drawee will accept more than one bill of the set. In 13 Peters, 205, *Downs v. Church*, the same point being presented to them, the Supreme Court of the United States said: "We are of opinion that the plaintiffs are entitled to recover upon the second of the set without producing the first, or accounting for its non-production." We can come to no other conclusion in this case.

It is therefore ordered, that the judgment of the district court be reversed, and proceeding to give such judgment as should, in our opinion, have been rendered below.—It is ordered, adjudged and decreed, that the plaintiffs do recover of, and have judgment against, the defendants *in solido*, for ten thousand eight hundred and seventy-six dollars and twenty-eight cents, with interest at the rate of seven per cent per annum from the 28th of February, 1839, the day of protest, until paid, with costs in both courts.

#### SAME CASE—ON A RE-HEARING.

THE judgment of the court, on a re-hearing, was pronounced by EUSTIS, C. J. The defendants were sued as endorsers of a bill of exchange drawn in June, 1838, by *Shipp, Ferriday & Co.*, of Natchez, payable eight months after date, on *Bullitt, Shipp & Co.*, of New Orleans, and by them accepted. The plaintiff was nonsuited in the court below, and on an appeal taken to the late Supreme Court, in 1843, the judgment of nonsuit was set aside, and judgment rendered against the defendants *in solido* for the amount of the bill, with interest and costs. That court granted a re-hearing. The case has remained since that event on the dead docket. It has recently been placed on the regular trial docket, and has been submitted to us on an argument, in writing, of the counsel for the plaintiff.

*Austin Williams* is dead, and his succession is not represented; the case, so far as his succession is concerned, remains *in statu quo*. The responsibility of *Routh* is alone the subject of our inquiry.

The endorsement of *Routh* was made under a power of attorney to *William Ferriday*, and we concur in the opinion of the court, that *Ferriday* had power to bind, and did effectually bind *Routh*, by the endorsement. *Reynolds v. Rowley*. 2d Ann. 894. In relation to the sufficiency of the notice of the protest of the bill to *Routh*, all doubt must disappear before the facts disclosed by the post master at Natchez. There was no post office at that time in Concordia. *Routh* was in the habit of receiving his letters, most of the time, at Natchez, and he had a box at the post office there for the reception of his letters.

A question was raised as to the right of the plaintiff to recover on the accepted second of the exchange, without accounting for the first. There can be no doubt as to the right to recover. *Downs v. Church*, 13 Peters, 205.

The judgment of the Supreme Court gave the plaintiff seven per cent interest. Our impression is, that five per cent is all the law allows.

The judgment heretofore rendered in this case, by the former Supreme Court, be affirmed against *John Routh*, abating two per cent of the interest.

## WILLIAM CALMES, Tutor, et al. v. WILLIAM STONE and Wife.

An agreement, in writing, made by an attorney conducting a cause, and within the scope of his authority, is binding upon his client, although the counsel be changed.

There is nothing so irregular in the court granting leave to an attorney to withdraw a commission, for the purpose of having it properly authenticated, as to justify the rejection of the testimony.

**A**PPEAL from the District Court of East Feliciana, *Stirling, J.* Jury case. *Musc and Merrick*, for plaintiffs. *J. B. Smith*, for defendants. By the court:

**PRESTON, J.** This is a petitory action, brought by the heirs of *Mrs. Calmes*, to recover a slave named *Isabella*. They allege, that the slave was given by their grand-mother to their mother, during life, and to them at her death. They prove it by a single witness, whose deposition was taken in the State of Mississippi, under a commission.

The deposition was objected to, on the ground, that the commission to take it was issued by the deputy clerk of the district court in East Feliciana. An agreement was made, in writing, by the greater part of the members of the bar of East Feliciana, to waive this objection. It was signed by the counsel then conducting the defence in this case, and was, therefore, binding upon the defendants, although they changed their counsel.

The execution of the commission was also objected to, as not being properly authenticated by the Governor of the State of Mississippi. At first, it was not; but the plaintiff obtained leave from the court to withdraw the commission and testimony, and sent it back to the governor, who then authenticated it in due form. We see nothing so irregular in this as to justify the rejection of the testimony.

We have rarely seen a petitory action supported by such feeble testimony. A single witness proves, that the grand-mother of the plaintiffs, at a remote period, in South Carolina, loaned the slave to their father, and, by will, bequeathed her to their mother, during life, and to them, at her death. The slave is not mentioned in the will or inventory of the estate of the grand-mother.

The defendants have held the slave *bona fide* in this State, under an authentic act of sale, from one *Christian*, ever since the year 1840. But for the verdict of the jury, we should be compelled to nonsuit the plaintiffs. In consideration of that verdict, on evidence entirely unsatisfactory to us, we think it better to remand the cause, that the plaintiffs, who are minors, may have an opportunity of strengthening their case by other testimony. As to *Elizabeth B. Calmes*, one of the plaintiffs, there is no appeal, and the judgment must stand as to her. As to the other plaintiffs, the judgment of the district court must be reversed, and the cause remanded for another trial; and the appellees are condemned to pay the costs of the appeal.

## JOSEPH MONGET, Tutor, v. JOSEPH PENNY et al

Where a husband, without qualification or limitation, joined his wife in signing a promissory note, it will be presumed, that he intended to bind himself for its payment; and not that he merely authorized her to incur the obligation.

The makers of a promissory note, which reads, "I promise to pay," &c. &c., incur a solidary obligation.

A father, acting in the capacity of tutor to his minor children, is the representative of the succession of their mother, and as such, the proper party to be sued for a debt for which she was liable.

**A** PPEAL from the parish of East Baton Rouge, *Burk, J. George S. Lacy,* for plaintiff. *D. D. Avery,* and *H. B. White,* for defendants. By the court :

EUSTIS, C. J. This action is brought upon a promissory note, signed by the defendant *Penny* and his *Wife*, against *Penny* and the heirs of his deceased wife.

The defendant himself pleaded the general issue, and, as tutor to his minor children, took an exception to the plaintiff's action.

The case was submitted to the court below, on the pleadings and on the evidence adduced. The court sustained the exceptions to the action, and dismissed the plaintiff's petition. The plaintiff has appealed.

It is insisted in this court, that the judgment of the district court ought to be reversed, and an absolute judgment rendered against *Penny*.

The note sued on is to this effect : Twelve months after date, I promise to pay to the order of *Thomas Lilley*, two hundred dollars, at the Branch of the City Bank, New Orleans, &c ; signed, *Ann M. Penny, Joseph Penny*.

It is contended, that in signing this note *Penny* did not bind himself, but merely gave his authority to his wife to bind herself. We are of a different opinion. *Penny* having affixed his signature to the note without any qualification or limitation, must be considered as contracting a personal obligation. If he merely intended to authorize his wife to bind herself, he should have so written, according to the uniform usage in such cases. He bound himself, by his signature, as a promisor, and is responsible *in solido* with his wife on the note. It reads as to him, *I promise*, &c., and does not imply a joint obligation, as if the plural, *we promise*, was made use of.

The exceptions made by the defendant in his capacity as tutor to his minor children were, first, that the plaintiff's claim, being against the succession of their mother, the minor heirs could not be sued by an action against their tutor, and judgment rendered against them, inasmuch as they were beneficiary heirs, and not personally responsible for the debts of their mother; secondly, that the succession never having been subjected to a judicial administration, and no partition of the same having been made, the plaintiff should have caused an administrator to be appointed, against whom, as the legal representative of the succession, suit ought to have been brought.

We are of opinion, that the plaintiff was not bound to cause an administrator to be appointed to the succession, and that the defendant, as tutor to his minor children, was the representative of the succession, and as such, the proper party defendant to the plaintiff's suit.

7 134  
44 2067 134  
48 1807 134  
52 1816

It is therefore ordered, that the judgment of the district court be reversed, and that the case be remanded for further proceedings against *Joseph Penny*, tutor of his minor children; and it is further ordered, that the plaintiff recover from the defendant, *Joseph Penny*, the sum of two hundred dollars, with interest at ten per cent per annum, from January 1st, 1841, with costs in both courts.

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### ELIZABETH and MARY JANE SHIELDS v. RAMON LAFON.

The retrocession, by the surviving spouse, of property purchased during the community, will, if necessary on account of the debts of the community, be valid. The failure of the heirs to show that there is property to satisfy the debts, raises the presumption that the retrocession was not a voluntary act, but *ex causa necessaria*.

The heirs of the deceased spouse cannot annul an act of retrocession, made by the survivor for the purpose of paying the debts of the community, without tendering the price of the property, and the interest due on it, up to the day of the retrocession.

**A** PPEAL from the District Court of East Baton Rouge, *Burk, J. Samuel P. Greves*, for plaintiffs. *George S. Lacey*, for defendant. *A. M. Dunn*, for *Nephler*, warrantor. By the court:

Rost, J. During the existence of the community between the plaintiffs' father and mother, their father purchased from *Francis Nephler*, several lots and the improvements thereon, for the price of \$4048, for which the purchaser gave his four promissory notes of \$1012 each, secured by mortgage, and payable respectively in 1, 2, 3 and 4 years, from the 9th day of January, 1830.

The plaintiffs' mother died in 1833. No steps were taken to open or settle her succession, and on the 17th April, 1834, their father having disposed of some of the lots and accounted for the proceeds thereof to *Nephler*, and the remaining lots being still entirely unpaid, he went before a notary, and, in consideration of the notes he had given, and of the interest which had accrued upon them, made to his vendor, who accepted it, a retrocession of the property. The defendant holds the lot in controversy under this retrocession.

The plaintiffs, in right of their mother, set up title to one undivided half of the lot, on the ground that the title vested in them at the death of their mother, and that they have never been legally divested of it.

It is in evidence that, at the death of the wife, the community owed many debts, and the plaintiffs have failed to show property to a sufficient amount to satisfy them. This forces upon us the conclusion, that the retrocession to *Nephler* was not a voluntary act, but was made *ex causa necessaria*, and on account of the utter inability of the community to pay the price. Under the rule laid down in the case of *Chretien v. Richardson*, such a retrocession, when made between proper parties, has all the effects of a judgment decreeing a resolution of the sale for the non-payment of the price. 6th Ann. 2.

The property in this case would have returned to *Nephler* free from any mortgage or claim of the wife, if the retrocession had been made in her life time, the retrocession being inevitable if the vendor required it. The plaintiffs sustained no injury in consequence of the form in which it was made. If the father had been confirmed as natural tutor, and had made it, in that capacity, for the minor's share, with a view to avoid the expense of litigation, we would undoubtedly have sustained it as an advantageous compromise, involving no

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alienation of the minor's property. And as he who, without being a tutor, undertakes to manage the property of minors, subjects himself to all the liabilities of the tutorship, there seems to be no reason why acts done by him while thus acting, of which the minors have derived the full benefit, should not also be binding upon them, when third persons have acquired rights under those acts; however this may be, the plaintiffs have not tendered the price of the land, and the interest due on it, up to the day of the retrocession. This is sufficient to defeat their claim.

Judgment affirmed, with costs.

### S. M. BRIAN, vs. JOEL SPENCER.

An endorser, who pays a promissory note, when, in consequence of an informal protest, he was discharged, obtains no greater rights against the maker than appertained to the transferor, by whom it was discounted, and from whom it was obtained. The same prescription is applicable to both transferor and transferee.

**A** PPEAL from the District Court of East Feliciana, *Stirling, J. Muse and Merrick*, for plaintiff. *W. D. Winter*, for defendant. By the court:

SLIDELL, J. The note being informally protested, and the endorser being under no legal liability to pay it, cannot be considered in a more favorable light than as taking the rights of the bank with whom the makers had the note discounted. But the bank's claim as holder of the note, was clearly subject to the prescription of five years, and the transferee of the bank is consequently subject to the same prescription. See *Christine vs. Chaney*, 5 Ann. 219.

In this case, it is unnecessary to consider whether an accommodation endorser, who has been legally made liable upon his endorsement, and pays the holder as endorser, is subject, as against the maker, to the prescription of five years, established by the art. 3505, or the longer prescription established by art. 3508.

Judgment affirmed with costs.

### JOHN P. WALWORTH et al., Trustees, v. Succession of JOHN SNODGRASS et al.

Although an action to subject property to the payment of the debts of the succession, on the ground that the possessor holds under simulated conveyances, should be brought by the administrator, and not by the creditors of the deceased, yet where the creditors sue both the administrator and the fraudulent possessor, and the administrator adopts the prayer of the plaintiffs against his codefendant, and asks that the property held by the latter be restored to the succession and sold for the payment of debts in due course of administration: in such a case, the creditors are competent to sue.

An answer was filed after the exception had been taken to the plaintiffs' action. *Held*: In determining on the exception, the court was bound to take cognizance of the pleadings as they then stood.

**A**PPPEAL from the District Court of the parish of Tensas, *Richardson, J. Montgomery*, for plaintiffs. *Saml. R. Walker* and *A. N. Ogden*, for defendants, contended: The suit is one brought on behalf of the succession, by one who shows no right to represent it, and cannot, therefore, maintain the action. The principle has been several times recognized by our courts, that an individual creditor is without right or capacity to exercise rights properly belonging only to the legal representatives of the estate. *Vienné v. Boissier*, 10 M. R. 359. *Miles Judson, adm., v. Connolly and Husband*, 5th Ann. 400. In support of the same doctrine, we refer to Story's Equity Pleadings, par. 185, and to 4th Vesey's Rep. 665.

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SNODGRASS

By the court:

EUSTIS, C. J. The Court of the Tenth District dismissed the petition of the plaintiffs so far as relates to the defendant, *John W. Snodgrass*, on an exception taken by him to the plaintiffs' action. The plaintiffs have appealed.

The plaintiffs, being judgment creditors of the late *John Snodgrass*, whose succession is represented by *L. Vincent Reeves*, administrator, brought their suit to subject certain property alleged to belong to the succession of the deceased, but to be held by his son, *J. W. Snodgrass*, under certain fraudulent and simulated conveyances, to the payment of their judgments. *J. W. Snodgrass* excepted to the action, on the ground that it could only be maintained in the name of the representative of the succession, and so the district judge held. The case of *Vienné v. Boissier*, 10 M. R. 359, supports the general principle on which the decision rests.

This case is different from that cited, and is somewhat complicated by the fact that the administrator of the succession was made a party defendant to the suit, for the purpose of obtaining judgment against the succession on a judgment rendered against *Snodgrass*, the deceased, in Mississippi. In his answer, the administrator joins the plaintiffs in their prayer to subject the property in the hands of *Snodgrass*, the son, to the debts of the father, and asks that it be restored to the succession and sold for the payment of its debts in due course of administration. This answer was filed after the exception was taken to the plaintiffs' action. In determining on the exception, the district judge was bound to take cognizance of the pleadings as they then stood. The administrator was then in court, asserting the plaintiffs' right of action for the benefit of all the creditors. Besides, the party excepting did not ask the dismissal of the petition on the exception being sustained. We think the district court erred, but the plaintiffs ought to pay the costs in the district court.

The judgment of the district court is therefore reversed and the case remanded for further proceedings, the appellee paying the costs of this appeal, and the plaintiffs the costs in the district court.

Application for re-hearing refused.

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NANCY HOOPER, Administratrix and Tutrix, v. JAMES S. RHODES et al.

A plea of compensation, urged as matter of defence, and rejected by the court, cannot, in a subsequent action, be made the basis of an injunction to restrain an execution on the former judgment.

**A**PPPEAL from the District Court of East Baton Rouge, *Burk, J. George S. Lacy*, for plaintiff. *A. M. Dunn*, for defendant. By the court:

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SLIDELL, J. This injunction suit is an attempt to renew, in another form, a plea in compensation which was rejected by this court in *Rhodes et al. v. Hooper*, 5th Ann. 357, the decree, in which case, *Rhodes et al.* were attempting to enforce by *fiery facias* when they were arrested by the present injunction.

The district court did not err in dissolving the injunction, so far as it rested upon the alleged right of compensation.

Another ground for the injunction, set up by *Mrs. Hooper*, was, that she had deposited in the hands of the clerk a sum of money equal to the amount of the judgment obtained by *Rhodes et al.*, in the case cited, less the portions due by them to her by reason of her payment of the Union Bank mortgage, which is spoken of in the decree in that cause, and was the subject of the plea in compensation, which we then refused to entertain.

We have considered the terms of the deposit, the correspondence between the attorneys of the parties, and all the circumstances of the matter as disclosed by the evidence, and are of opinion that it would be improper to disturb the conclusion of the district judge, who thought the judgment creditor was not estopped from issuing his execution for the balance of the judgment, by receiving the amount deposited in court.

Judgment affirmed ; the costs of appeal to be paid by the appellant.

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### ANN RAY v. M. HARRIS et al.

The conduct and declarations of both parties to a written agreement, may be admitted to prove a fraudulent simulation. Such is also the rule of the common law.

At the common law, a person who receives property under a fraudulent conveyance, to screen it from the debts of the owner, cannot sustain the conveyance in an action against a subsequent vendee who derives title from a sale by the same owner.

**A**PPEAL from the District Court of East Feliciana, *Stirling, J. Stocton and Sawyer*, for plaintiff. *James H. Muse*, for defendants. By the court:

PRESTON, J. The plaintiff, residing in the State of Mississippi, brings this suit to recover a number of negroes from several defendants. She claims them under a bill of sale made to her by her brother-in-law, *Thomas C. Patterson*, in Lawrence county, in the State of Mississippi, on the 2d day of August, 1839.

The defendants hold the slaves by virtue of notarial titles, made to them by one *O'Connell*, in the parish of East Feliciana, in the year 1841 ; and he derived title by a like act, from the same *Thomas C. Patterson*, dated the 15th of April, 1841.

The defendants aver, that " the pretended act of sale mentioned in the plaintiff's petition, if any such exists, was and is a false, fraudulent and collusive act and transaction between the said *Patterson* and plaintiff, *Mrs. Ray*, entered into without consideration, and intended to defraud all and every person who has had or might have dealings with one or other of said parties, and the plaintiff ought not, and should not have any action based on said pretended, false and fraudulent instrument."

This pleading clearly indicated to the plaintiff, that the defendants intended to show that the bill of sale, upon which she relied as the foundation of her suit,



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was a fraudulent simulation. She took no exception to the answer, and throughout the suit the defendants contested her title on this ground.

The witnesses, as usual in such cases, are numerous; the examination and cross-examinations protracted and tedious; the record is studded with bills of exception, and is extremely confused and voluminous.

We do not deem it incumbent upon us, in this case, to digest and detail the testimony, or even to express an opinion on all the bills of exception. Those which were taken to the admission of evidence to show the acts and declarations, and even the silence and omissions of the plaintiff when she should have acted, and also the acts and declarations of *Patterson*, her apparent vendor of the slaves, we think unfounded. The defendants are sued by virtue of a bill of sale made in Mississippi many years before the commencement of the suit, and also anterior to their open possession, in good faith, of the slaves, under formal titles made in Louisiana, and derived from the same vendor. They allege that the title made to the plaintiff, by this vendor, is a false title; "a pretended title, made without consideration; a fraudulent title;" in a word, a fraudulent simulation.

They undertake to show this, and under our laws may do so; and the conduct and declarations of both parties to the instrument have always been admitted in evidence for that purpose. And we do not believe that, at common law, a fraudulent paper which, after accomplishing its purposes of screening property from the just pursuit of creditors, has slept for years as a nullity, could afterwards be raked up and successfully used for the fraudulent recovery of the property from *bona fide* purchasers, from the real owner. And, further, that the acts and declarations of the parties to the paper might be given in evidence to show it a fiction, in defence of such a suit. This being established, there is ample evidence in the record, which is manifestly legal and free from other exceptions, to lead us to the conclusion, with the jury and district court, that there should be judgment for the defendants.

The bill of sale purports to transfer from *Patterson* to the plaintiff, fifteen slaves, wagons and oxen, horses, and stocks of cattle and hogs, household furniture and family utensils, in consideration of eight thousand seven hundred and twenty dollars to him paid. He had just been sued for a large debt, and the evidence leaves no doubt on our minds that he was embarrassed, if not insolvent, and had, therefore, motives to make an apparent sale of his slaves to his sister-in-law, the plaintiff. It is hardly pretended, that he delivered the other effects mentioned in the bill of sale.

The evidence satisfies us that the plaintiff, *Mrs. Ray*, was also embarrassed at the time; that she not only had not eight thousand seven hundred and twenty dollars, but no means to make such a purchase. She was a widow woman, kept a boarding house in the interior of the State, not even in a village, was raising her family expensively, and had but little property.

As soon as the sale was made, in Lawrence county, *Patterson* moved near to her, in Franklin county, and, we think, kept possession of all the property except a few of the slaves. He soon afterwards moved to Clinton, in Louisiana, and there possessed and sold the slaves. We do not believe that they ran away or were stolen by him, but that he took them away from the State of Mississippi because they were, in reality, his own property.

*Patterson* claimed hire for the slaves while they were in the plaintiff's possession. She claimed five hundred dollars from him as a reason for retaining them, but

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entirely failed to make the efforts to reclaim them when taken away, which would have been made by a real owner.

The evidence convinces us that the plaintiff knew that *Patterson* had brought the slaves to Clinton, in Louisiana, and that he had sold some and kept others; and that she acquiesced in it three or four years, because the slaves were his, and not hers.

It is inconceivable that she should have placed her daughter at his house, for the purpose of education, at Clinton, knowing that he had stolen, and was in possession of, some of her slaves.

An intimate and confidential intercourse existed between the plaintiff and her brother-in-law, *Patterson*, and his family, after he sold the slaves in Louisiana, and even to the present time; which is utterly inconsistent with the supposition that he run off her slaves, to her knowledge, and sold them in Louisiana.

We have strong reason to believe that this suit is prosecuted, not for her benefit alone, but also for the benefit of *Patterson*, who sold the slaves in Louisiana, received the price, and under which sale the defendants hold the title and possession of the slaves.

We will not recapitulate the evidence in detail, but will observe generally, that we have rarely had under consideration a suit in which we were more strongly convinced of an attempt to impose upon the court, and deprive honest purchasers of their property, by a false and fictitious sale.

The judgment of the district court is affirmed, with costs.

#### MARY GALE v. ANDREW MATTA.

In a contest between the wife, who claims a tacit mortgage on immovable property sold by the husband after the right of mortgage accrued, and parties who claim through the privilege of the husband's vendor, the circumstance, that the act from which the privilege resulted, was not recorded, is fatal to the pretensions of the latter.

The law gives to the wife a tacit mortgage upon the husband's immovable property, dating from the conversion of her paraphernal funds to his own use.

Prescription is suspended during marriage, when the husband, having sold an hereditary estate of the wife, without her consent, is bound in warranty for the validity of such sale; and in every case where the action of the wife may be prejudicial to the husband. C. C. 349.

**A**PPEAL from the District Court of the parish of East Baton Rouge, *Burk, J. J. M. Elam*, for the plaintiff. *George S. Lacy*, for the defendant. By the court:

**SLIDELL, J.** This is an hypothecary action, in which the plaintiff, a married woman, seeks to enforce her tacit mortgage against a lot of ground, now owned by the defendant.

The defendant having denied the existence of the alleged claims of the plaintiff against her husband, *James D. Stuart*, it is necessary, first, to ascertain the existence and amount of his indebtedness.

In 1843, *Mrs. Stuart* brought suit against her husband for a separation of property, and to enforce her claims against him for paraphernal property converted to his own use. In her petition, she alleged two items of indebtedness, one for the sum of \$1800, for so much money received by her husband

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from the estate of her father, the other for the sum of \$1250, the alleged proceeds of the sale by him of two slaves belonging to her. She obtained a judgment against her husband for \$2940. From the evidence now offered, which consists in part of the testimony of the same witness who testified in the plaintiff's suit against her husband, it does not appear that the amount received by *Stuart* from the estate of his wife's father, exceeded \$1500. This indeed was the extent of proof as to that item in the previous suit. With respect to the other item of \$1250, it appears that such was the price at which the wife obtained the slaves at the probate sale of her father's estate; but the price at which her husband subsequently sold them is now shown to have been \$700. It appears, therefore, that the true amount of the wife's claim against her husband is a capital sum of \$3200. She collected by *fiery facias* against her husband, on the 14th April, 1845, \$1222, which left, after the allowance of interest and costs, a balance due on that day of \$1235 50. For this amount the law gave her a tacit mortgage upon the husband's immovable property, dating from the conversion of her paraphernal fund to his own use, which date is prior to the purchase by *Stuart* of the property now owned by the defendant.

The defendant attempts, on various grounds, to escape the effect of this tacit mortgage.

The lot of ground now owned by the defendant, was bought by *Stuart* from the syndics of *Alfred Gates*, an insolvent debtor, in 1838, for \$4000, payable as follows, as expressed in the deed of sale: "\$1200 are to be paid to the Bank of Louisiana, in discharge of a bond subscribed by *Alfred Gates* to said bank; \$1600 to *Mansker*; and for their liabilities as endorsers on a note due to the Carrollton Bank, for which, the above named amount, the said house and lot are mortgaged; and the balance of \$1200 is payable in one, two, and three years from the day of sale, for which balance, the said purchaser furnished three notes of \$400 each." In 1840, *Stuart* sold the lot to *Nancy McGilligan*, at the price of \$4000, of which amount a part was paid in cash; and for the residue, the purchaser assumed the payment of various debts due by *Stuart*, and enumerated in the deed. Among these, were an amount of \$800 due to the Bank of Louisiana, on the 16th April, 1840, and a note of *Stuart*, endorsed by *A. Matta*, and *A. Adams*, due 26th October, 1840, for \$1200, and held by the Carrollton Bank.

In 1843, *Nancy McGilligan* sold the lot to *Matta*, the defendant, who has possessed it since that time.

Although the evidence is somewhat obscure, there is perhaps enough to satisfy the mind, that *Matta* paid two thousand dollars upon the claims of the Bank of Louisiana, and of the Carrollton Bank. The debt due to the Bank of Louisiana, which existed in the form of a bond for \$2000, bearing date the 16th April, 1833, and signed by *Alfred Gates* and *Andrew Matta*, as principals, and *James Mansker*, as surety, does not appear to have been novated. It had been reduced by partial payments from time to time, and on the 10th April, 1841, *W. B. Knox*, made a payment upon it of \$800. *Knox* testifies that he made this payment for the benefit of *Matta*.

The debt to the Carrollton Bank, which *Stuart* assumed in the deed by which he purchased the lot, in 1838, seems to have been novated. It first existed in the form of a note made by *Gates* and *Matta*, endorsed by *Mansker* and *Dewey*, dated 27th October, 1836, at 12 months, for \$2000. This claim, after passing through various renewals, and being reduced from time to time, appears on the

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24th October, 1839, in the form of a note made by *J. D. Stuart*, endorsed by *Matta, Adams and Mansker*, for \$1200, at twelve months; and it would seem that *Matta* took up this last mentioned note, on the 22d October, 1840, with his own means.

Now, the argument is, that the agreement of *Stuart* to pay the claims of the Bank of Louisiana, and the Carrollton Bank, formed part of the price of that purchase, and was protected by the vendor's privilege; and that when *Matta* paid the balances remaining due upon those claims, he became legally subrogated to all the privileges of *Stuart's* vendor.

Aside from other difficulties which surround the pretensions of the defendant, an insurmountable obstacle to his success is found in the fact, that there is no evidence to show that the vendor's privilege arising from the sale to *Stuart*, or the mortgage granted in it, were preserved or made effectual by registry. Whether any registry was ever made or not, it at least appears, that no such encumbrance was of record against *Stuart* in the year 1840, when he sold to *Nancy McGilligan*. And it is quite material here to add, that, in a tableau of distribution, filed in the year 1839, by *Matta*, as the syndic of the creditors of *Gates*, he makes the following statement: "The store on Church street was sold to *James D. Stuart* for \$4000; but, as that property was specially mortgaged to the Louisiana Bank, for the sum of \$1200, and also to *Messrs. Mansker and Dewey*, for the sum of \$1600, to secure them against their endorsements for that sum to the Carrollton Bank, such arrangements were made with the purchaser and with the said *Mansker and Dewey*, and with the said banks, that said mortgages were satisfied, and the notes of said *Gates* in favor of said banks were taken up; and for the balance of the price, being \$1200, the said *J. D. Stuart* gave his three notes, agreeable to the terms of the sale."

It seems to be assumed in argument by the defendant's counsel, that a distinction can be made between a wife and other mortgage creditors; and it is said, that "if there were no subrogation, equity, if not law, would forbid the wife's mortgage from resting upon any property belonging to her husband, until she had paid to another the sum by him advanced for the purpose of discharging the price."

That under some circumstances a distinction may be made between a wife and a third person, may be true. The case of *Dejean's succession*, 5th Ann. 594, cited by the defendant, affords an illustration. But in this case, *Mrs. Stuart* is separated in property from her husband, and we have been unable to discover any sufficient reasons for arresting her in the enforcement of her tacit mortgage upon the land in question. Our laws, granting the wife a mortgage, rendering it operative against third persons without registry, and thus sacrificing to her interests the rights of those whom her husband is bound to warrant and defend, may be harsh in their effects, and anti-commercial in their character. But these are considerations of policy which are out of our province.

With regard to the plea of prescription of ten years, we are of opinion that it cannot be sustained. Prescription is suspended during marriage, when the husband, having sold an hereditary estate of the wife without her consent, is bound in warranty for the validity of such sale; and in every case where the action of the wife may be prejudicial to her husband. Civil Code, 3491. C.N. 2256, Rogron. Pothier, Traité de la Prescription, No. 25.

As to the alleged right of discussion, it is sufficient to say it has not been properly exercised. See Civil Code, 3366, 3016. *Robechot v. Folse*, 11. L. R. 136.

The district court erred in giving an absolute judgment against the defendant personally. This was not consistent with the provisions of the Civil Code and Code of Practice, nor with the prayer of the petition. See C. C. 3363, 3364, &c. C. P. 68, 69. We will give the plaintiff a judgment for the enforcement of her mortgage, according to the prayer of her petition, and for the amount really due to her by her husband.

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v.  
MATTA.

It is therefore decreed, that the judgment of the district court be reversed. And it is further decreed, that the said defendant, *Andrew Matta*, do, within ten days from the date when this decree becomes final, pay to the said plaintiff, *Mary Gale*, wife of *James D. Stuart*, the sum of \$1235 50, and interest thereon, from 14th April, 1845, until paid, and costs of this suit in the court below; and that in default thereof, the said plaintiff have leave to seize and sell according to law, the real estate described in the petition, and in the act of sale dated 3d November, 1838, by *Gates* and *Matta*, syndics to *James D. Stuart*, whereof a copy is to said petition annexed, together with the buildings and improvements thereon. That in addition to making the usual total appraisement of said land and buildings and improvements preparatory to such sale, a separate estimate be made at the same time, by the appraisers, of the increased value at the time of the appraisement, which is the result of the brick buildings thereon erected, and a separate estimate of the said land and improvements without said brick buildings; and that in distributing the proceeds of said sale, the said defendant be entitled to receive thereout, a proportional part for the said increased value by reason of said brick building, and that the other proportional part of said proceeds, be applied to the payment of the plaintiff's claim. The appraisements so to be made, to be subject to revision by the court below, if either party so desire, upon rule for distribution of the proceeds of sale. And it is further decreed, that the plaintiff pay the costs of this appeal.

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### JOHN McDONOGH et al. v. RICE GARLAND et al.

The notice to be given to the debtor, of the seizure of property under execution, is no part of the proceedings which a purchaser at sheriff's sale is bound to heed or examine. It is for the benefit of the debtor in execution *exclusively*, and may be waived by him without prejudicing the rights of a purchaser, or vitiating his title.

The object of notice to the debtor is, to apprise him what property the sheriff takes in execution, and of which he claims to take possession by virtue of the seizure.

**A**PPEAL from the District Court of the Parish of Concordia, *Farrar, J. Stocton and Steele*, for plaintiffs. *D. S. Stacy*, for defendants. *Shaw*, for warrantor. By the court:\*

*EUSTIS, C. J.* The late *John McDonogh* and *Geo. T. Williams & Co.*, of New Orleans, instituted this action, having for its object the annulling of a sheriff's sale of a tract of land in the parish of Concordia, and having it resolved for their benefit. *McDonogh* was a mortgage creditor, and *Williams & Co.* were judgment creditors, of *Rice Garland*. The sheriff's sale was under an execution issued on a judgment against the debtor, rendered and recorded prior to the plaintiffs' mortgages.

\*Judge *Rost* took no part in this decision, having a remote interest.

McDONOGH  
v.  
GARLAND.

The judgment of the district court was in favor of the purchaser at sheriff's sale, and the plaintiffs have appealed.

In 1846, the Bank of Louisiana issued an execution on a judgment against *Garland* and *Swayze*, directed to the sheriff of the parish of Concordia. Under this execution the sheriff seized *Garland's* interest in the Bringier tract, as it is called, and advertised it for sale. It was appraised at \$8000, and two-thirds of the amount of the appraisement not having been bid, it was re-advertised for sale, on a credit of twelve months, and, at this second offering, *D. S. Stacy* became the purchaser, for \$4500, which he paid.

The question upon which it is understood this case turns, and the only one which has been argued before us, relates to the alleged want of any legal and sufficient notice of the seizure, under the execution, to *Rice Garland*, the judgment debtor.

The fact is, that notice of the seizure was given by the sheriff to *T. W. Curry*, who was an agent of *Garland* for the management and sale of the land, but whose authority to receive notice is not established. It is alleged in the plaintiffs' petition, that *Garland*, on the 15th of January, 1846, gave a power of attorney to *William H. Garland* and *Wm. C. Hamner*, of New Orleans, authorizing each of them to represent him in all suits at law. And it appears that, by said procuration, the said agents had, each of them, besides the most general powers, special authority to "defend suits to judgment, execution, and satisfaction," and to accept notices in suits and legal proceedings.

It further appears, that *Hamner* attended the sheriff's sale, and endeavored to ascertain from the agent of *Stacy*, who made the purchase, what he would take in advance on his bid.

It also appears, that *Rice Garland* appears by attorney in this suit and denies the allegations in the plaintiffs' petition. One of those allegations is, that no notice of the seizure was ever given to the said *Garland*.

It seems, therefore, as far as *Garland* is concerned, he made no question as to the sufficiency of the notice; nor, under this state of facts, could he be permitted to call it in question in a court of justice. He maintains the validity of the sale; no collusion is alleged between him and the purchaser, or the plaintiff in execution, or between either of them; and we are at loss for any adequate ground on which the sale can be set aside on account of the notice.

We have never understood that the notice to be given to the debtor of the seizure of property under execution, was a part of the proceedings which a purchaser at sheriff's sale was bound to heed or examine. It is for the benefit of the debtor in execution *exclusively*, and may be waived by him without prejudicing the rights of a purchaser or vitiating his title. *Hewitt v. Stephens*, 5th Ann. 640. *Lewis v. Gordy*, *Ib.* 570.

The object of the notice to the debtor, is to apprise him what property the sheriff takes in execution, and of which he claims to take possession by virtue of the seizure. Code of Practice, 654, and preceding articles.

The judgment of the district court is therefore affirmed, with costs.

### PILCHER and RAYBURN v. JAMES D. KERR et al.

In an action by the endorser, against the maker of a promissory note, who, at the time of its execution, was a married woman, the declarations of the payee, whilst he was the owner

thereof, are admissible to prove that it had been given to him for a debt due by the husband of the maker. *Held*: It is the settled jurisprudence of this court, that the *onus* of proving that the consideration of a note, made by a married woman, enured to her benefit, is upon the plaintiff.

PILCHER  
v.  
KERR.

Where the maker of a note signed as a married woman, and her husband only joined for the purpose of authorizing her, it is sufficient to give the transferee of the note notice of her condition; and before he takes the note, it is incumbent upon him to ascertain that her proper estate could be charged with it.

**A** PPEAL from the District Court of Carroll, *Copley, J. Selby*, for plaintiffs. *H. Snyder, Short and Parham*, for defendant. By the court: *Rost, J.* The defendant is sued upon a promissory note made by her, whilst she was the wife of *Felix Bothworth*, to the order of *James D. Kerr*, by whom it was transferred to the plaintiffs before maturity.

The defence is, that the note was given for a debt of *Felix Bothworth*, for which she could not bind herself, and that no part of the consideration of it enured to her benefit. There was judgment in her favor, and the plaintiffs appealed.

We are of opinion, that the district judge properly admitted the testimony of *John L. Wilson*, to prove the declarations of *James D. Kerr*, while he was the owner of the note; that it had been given to him for a debt of *Bothworth*. It is unnecessary to determine whether this evidence makes full proof of the fact, as under the settled jurisprudence of this court, the *onus* of proving that the consideration of the note enured to the benefit of the defendant, was upon the plaintiffs.

The defendant had signed as a married woman, and her husband had only joined for the purpose of authorizing her. This gave the plaintiffs notice of her condition; and before they took the note, it was incumbent upon them to ascertain that her proper estate could be charged with it. *Brandagee v. Kerr and wife*, 7 N. S. 64. *Sprigg v. Bossier and wife*, 5 N. S. 56. *Firemen's Insurance Company v. Julien Cross*, 4 R. R. 508. *Draugeut v. Prudhome*, 3 L. R. 74. *Pascal v. Sourinet*, 1st Ann. 428. *Taylor v. Carlisle*, 2d Ann. 579. *Perry v. Thompson*, 3d Ann. 188. *Erwin v. McCalop*, 5th Ann. 173. *Gaalon v. Matherne*, 5th Ann. 495. *Patterson & Co. v. Fraser and wife*, 5th Ann. 586.

Judgment affirmed, with costs.

Application for re-hearing refused.

### STEPHEN F. SMITH v. MOSES MCWATERS.

The call in warranty is not a dilatory exception, but an incidental demand in the answer, to enforce a legal right of the defendant.

Calling a non-resident warrantor in warranty, through a curator *ad hoc*, has no more substantial effect than if he were notified by the defendant; for the judgment against the curator *ad hoc* would not be absolutely binding upon the warrantor, in another State, unless he authorized the curator to defend the suit.

By the Court: We would not be understood as disapproving of the practice of the appointing a curator *ad hoc* to an absent warrantor; the power may be fairly inferred from the articles of the Civil Code and Code of Practice, providing for the prosecution of suits

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SMITH  
v.  
McWATERS.

against absentees. Therefore, if a judge struck out a call in warranty of a non-resident defendant, and thereby the defendant lost any substantial advantage, the Supreme Court would remand the case, and have the call in warranty reinstated.

By a statute of Mississippi, copies of all instruments of writing, which are permitted to be recorded, may be received in evidence. Under this act, a copy of a record is not a copy of a copy.

The code suspends prescription during minority. It does not *except* from suspension the prescription of fifteen years. This suspension extends to non-resident as well as to resident minors.

**A**PPEAL from the District Court of West Feliciana. This cause was tried by a jury before *Stirling, J. James H. Muse*, for plaintiff. *J. A. Patterson, C. Ratliff and Brewer and Collins*, for defendant. By the court:

PRESTON, J. This is a petitory action for a slave named *Soney*, alias *Charles*. There was a judgment and verdict for the plaintiff, and the defendant has appealed.

The petition was served upon the defendant on the 15th of October, 1850, unaccompanied by the title upon which the suit was based. On the 5th of December, a judgment, by default, was entered. On the 9th of December the defendant appeared, had it set aside, and craved oyer of the plaintiff's title. On the 12th it was filed, and notice thereof given to the defendant. The same day the defendant filed his answer, denying the plaintiffs' title, and setting forth his own. He alleged, further, that he purchased the slave from *Abraham Jones*, residing in Franklin county, State of Mississippi, and called him in warranty, and prayed that a curator *ad hoc* might be appointed to represent him, which was done. On the 31st of December, the plaintiff moved the court to strike out that part of the answer calling *Jones* in warranty, which motion was ordered to be heard. It was based on the grounds, that the call in warranty came too late, it being in fact and effect, as well as in law, a dilatory exception, and should have been plead in *limine litis*, and cannot be legally allowed in an answer after a default has been taken.

We do not find in the record a formal order striking out the call in warranty in the answer, but suppose it must have been made, as a bill of exceptions was taken on the 3d of January, 1851, to the opinion of the court sustaining the motion to strike out that part of the answer.

The call in warranty was not a dilatory exception, but an incidental demand in the answer to enforce a legal right of the defendant. C. P. 362, 363, 378 to 388. C. C. art. 2476 to 2495. But we do not think that substantial justice requires that this cause should be remanded, on account of the error of the court in striking out the call in warranty.

The warrantor resided in another State, and it is not shown, or to be presumed, that he had property in this State. The only substantial effect, therefore, of calling him in warranty, through a curator *ad hoc*, would have been to give him judicial notice of the suit, that he might defend it if he chose, and if not, to obtain from him all the means of defence in his power. The plaintiff could effect what was equivalent, by giving the warrantor notice of the suit himself, Code 2493, 2494, and thereby accomplish all that could be done, so as to produce legal effects, through a curator *ad hoc*; for the judgment against the curator *ad hoc* would not be absolutely binding upon the warrantor in another State, unless he authorized the curator to defend the suit. As the warrantor lived in a neighboring county of the State of Mississippi, the defendant might have given the notice contemplated by our code, and, also, obtained from him all the means of defence in his power, before he filed his answer in December, 1850, or, at all events, before the trial of the suit in June, 1851.



Our Code of Practice provides for the call in warranty, by service of the petition and citation, on the warrantor, which seems to be the only mode contemplated as to this incidental demand. But we would not be understood as disapproving of the practice of appointing a curator *ad hoc* to absent warrantors; the power may be fairly inferred from the articles of the Civil Code and Code of Practice, providing for the prosecution of suits against absentees. And we would remand the cause for the purpose of reinstating the call in warranty, if it appeared that the defendant had lost any substantial advantage, which he might have enjoyed, if the call had been sustained. An error of the Court, the effects of which might and probably was remedied by other means, is not a sufficient reason for remanding a cause, after all the delays, expense and trouble of a trial.

SMITH  
v.  
McWATERS.

The plaintiff relies upon a deed of gift from his uncle, *John Cade*. He produced a duly certified copy of the record of the deed in Franklin county, in the State of Mississippi. The record was made the 3d of December, 1828. The counsel of the defendant objected, that it was a copy of a copy, and therefore inadmissible in evidence, and took a bill of exceptions to its admission.

A statute of the State of Mississippi, approved the 13th of May, 1837, provides, that copies of all recorded deeds, conveyances, bonds and other instruments of writing, which are now, or may hereafter, by the laws of this State, be required or permitted to be recorded, shall, when certified by the clerk in whose office the record is kept, be received in evidence in any court of law or equity in this State, and be as available, without accounting for the absence of the original, as if the original were there and then produced. *Hutchinson v. Miss. Code, sec. 1, p. 869.* We think the copy from the record was intended by this act, and not, as contended by the defendant's counsel, to be a copy of the deed recorded, when the original has not been lost; and, if so, the act of Congress providing for the authentication of records, makes the copy evidence in our courts.

The plaintiff shows possession of the slave by his father for him, while a minor, under this deed; and by testimony identifies the slave sued for, with the one conveyed to him by the deed of gift from his uncle.

The defendant shows a sale of the slave, made to his mother by *Abraham Jones*, dated the 4th of March, 1836, and possession from that time until the commencement of this suit in December, 1850, and pleads the prescription of five, ten and fifteen years.

The plaintiff, until within the last year or two, was a minor. The code expressly suspends prescription during minority. Article 3488 does not except from the suspension, the long prescription of fifteen years.

The point presented by the counsel of defendant, that our laws suspending prescription in favor of minority, can only avail resident, and not non-resident minors, is not sustained by reason or authority, and cannot, therefore, be sanctioned.

The judgment of the district court is affirmed, with costs.

**NEW ORLEANS and CARROLLTON RAILROAD COMPANY v. MUNICIPALITY NUMBER ONE.**

In authorizing the Mayor and City Council to sell property on perpetual ground rent, the Legislature established a legal destination of the rents, as a portion of the permanent revenue of the city, to enable the municipal authority to exercise its power of police and government. These rents, therefore, cannot be sold under an execution against the municipality.

**A**PPEAL from the Second District Court of New Orleans, *Lea, J. Benjamin and Micou*, for plaintiffs. *Robert Preaux*, for defendants. By the court :

**EUSTIS, C. J.** This appeal is taken by the First Municipality, from a judgment of the court of the Second District of New Orleans, by which an injunction obtained by the municipality was dissolved, with three hundred dollars damages, for the wrongful suing out of said writ.

The plaintiffs being judgment creditors of the municipality for a large amount, seized certain ground rents due by various persons under execution, the municipality enjoined the sale, and the question is thus raised, whether these ground rents are liable to be seized and sold under the plaintiffs' execution.

The argument at bar has been directed to two points : first, whether the ground rents can be seized ; and, secondly, whether, if subject to seizure, they can be sold, or must be collected by the sheriff as they fall due, and applied to the payment of the plaintiffs' judgment.

It is contended, that the ground rents are on the same footing with any other property of the municipality, and, as such, liable to seizure for its debts, and that they are not within the exemption established in *Egerton's* case. The land on which the ground rents are established, formed originally a part of the commons of the city. They were sold under the authority of an act of the Legislature of the 17th of February, 1821, which provided, that the Mayor and City Council (three-fourths of said body assenting thereto) might sell, on perpetual ground rent, such part of the landed property as they should think fit, with express stipulation, that the purchaser should never thereafter have liberty to redeem said ground rent by paying the capital thereof.

The original charter of New Orleans, contemplated the existence and maintenance of certain permanent sources of revenue, which were to provide for the expenses of the government, and authorized taxation on real and personal property, to raise such sums as might be necessary to supply a deficiency in said revenues. Act of 1805 § 6 *et seq.* It is in that sense, and in conformity with the original law, that the statute of 1821, under which the sale of the land was made, must be interpreted. By this act, we conceive, a legal destination or appropriation of these ground rents was established as a portion of the permanent revenues of the city, to enable the municipal authority to exercise its powers of police and government.

We do not think the present case distinguishable in principle from that of the *Mayor et al. v. Roosevelt*, recently decided, 7th Ann. *Egerton v. Municipality No. 3*, 1st Ann. 435. *Police Jury of West Baton Rouge v. Michel*, 4th Ann. 84. *Hart v. Municipality No. 3*, 6th Ann. 571.

We think the court erred in dissolving the injunction against the sale of the New Orleans ground rents seized under the plaintiffs' execution.

It is therefore decreed, that the judgment of the district court be reversed, and the injunction granted be maintained and made perpetual; the plaintiffs paying costs in both courts.

NEW ORLEANS  
AND  
CARROLLTON  
RAILROAD Co.  
v.  
MUNICIPALITY  
No. ONE.

### MUNICIPALITY NUMBER ONE v. STEAMER ANNA No. 2, and Owners.

The act of the Legislature of 1847, required each municipality of New Orleans, annually, in January, specially to appropriate a per centage of the revenues, derived from the markets and wharfage, to the sinking fund, as established by that act. *Held*: The rate of wharfage cannot be changed during the year.

**A** PPEAL from the Justice's Court of New Orleans, *Paul Pecquet, J. Robert Preaur*, for plaintiffs. *J. Bermudez*, for defendants. By the court:

EUSTIS, C. J. This appeal is taken by the defendants from a judgment rendered by *Paul Pecquet, Esq.*, one of the Justices of the Peace of New Orleans. It decreed the recovery of the sum of \$23 25, being the amount due the municipality for a wharfage tax on the steamer *Anna*, and the appeal is before us under the article sixty-third of the Constitution, which gives this court the right of determining, in the last resort, on the constitutionality and legality of taxes and imposts imposed by municipal corporations.

It seems that the amount claimed is for wharfage of the steamer, under an ordinance of the general council of New Orleans, passed on the 26th of November, 1850. It is contended that this ordinance is repealed by a subsequent ordinance of the same body, passed on the 12th of June, 1851.

The first ordinance imposes certain rates to be paid by steamers mooring or landing within the incorporated limits of the port, and was to take effect from the 1st of January then next ensuing. The act of 1847, entitled an act to provide for the payment of the debts of the municipalities of New Orleans, provided that each of the municipalities should annually, in January of each year, specially appropriate a per centage of the revenues derived from the markets and wharfage, to the sinking fund, as established by that act. Acts of 1847 § 4.

It seems obvious, that to give effect to this appropriation, the rate of the wharfage cannot be changed during the year. So far as the ordinance of 1851 changes the rate previously established for that year, it is illegal and must be disallowed.

The recent municipal organization having superseded that under which these ordinances were passed, we deem no further explanation of this subject necessary, than that given in the case of the *Board of Liquidators v. the Municipality No. 1*, 6th Ann. 21.

The judgment appealed from is therefore affirmed, with costs.

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## MICHAEL ZENOR v. PARISH OF CONCORDIA.

The Police Jury of the parish of Concordia had a right to locate the levee on its present site; a reasonable regard for the public safety required it, and therefore the plaintiff has no right to complain. *Salus populi suprema lex est* is the rule.

**A** PPEAL from the District Court of Concordia. This was a trial by jury. *A. Farrar, J.*, presiding. *Stacy and Sparrow*, for plaintiff. *H. B. Shaw*, for defendants. By the court:

**PRESTON, J.** In this State, so much exposed to ruinous inundations, the public have the undoubted right, on the shores of the Mississippi river, to the use of the space of ground necessary for the making and repairing of the public levees and roads. C. C. art. 661. It was the condition of the ancient grants of land on the Mississippi river, and sufficient depth was always given to each tract, to prevent the exercise of the public rights from proving ruinous to the individual.

Speculation and other motives have, in later times, caused the division and sale of some tracts, and entries of others, with large fronts and little depth, in opposition to the general policy of the country. Thus, in the present case, the plaintiff has scarcely any depth, with a large front, in a deep bend with a caving bank. The policy of the country and the laws of the land, made for the general safety, cannot yield to cases of individual hardship. Those who purchase and own the front on the Mississippi river, gain all that is made by alluvion, and lose all that is carried away by abrasion. And those who choose to purchase tracts with little depth, in caving bends, expose themselves, knowingly, to total loss, and must suffer the consequences when they occur. They suffer *damnum absque injuria*.

The parish of Concordia has been peculiarly exposed to inundation, and therefore the Legislature excepted that parish from the general levee law, passed in 1829, and by the 62d section of the act declared, that the police jury of the parish should have plenary and unlimited powers to make such enactments with regard to roads and levees, within their respective limits, as may be deemed necessary and proper by that body. Bul. and Cur. 760.

In 1848 and 1849 the police jury, in pursuance of these powers, caused to be constructed, in the bend just above and opposite Ellis' Cliffs, a levee 4 or 500 yards from the bank of the river. It was located by the inspector of levees, and made in pursuance of his recommendation, in these words: "Its position, with reference to the land owners, can be seen by reference to the map. It will be seen that *Messrs. Nelson, Zenor and Hamilton*, are the principal sufferers, but this could not be avoided without sacrificing the public good to individual interest. The distance of the levee, from the river, is 430 to 650 yards. It is estimated, from observation of the encroachments of the river at this point, that the proposed levee will remain at least twenty years. When we add to this the importance, nay, the indispensable necessity of such a levee, and the vast interest to be protected thereby, it is hoped your honorable body cannot long hesitate to devise some means to secure the parish from a general overflow, which I cannot but regard as inevitable in ordinary seasons of high water."

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PARISH OF  
CONCORDIA.

The levee cost the parish from twenty to thirty thousand dollars. No witness says it was unnecessary. All who express an opinion, concur that it is not at an unreasonable distance from the river, considering the history of that part of its bank, and its badly caving character.

If we were convinced, by the evidence, that the police jury had exercised their plenary power in an arbitrary or oppressive manner, we would not hesitate to sanction judicial power in restraining it, as was done in the case of *Dufresne* and *Haydel* and others.

But the evidence satisfies us, that the levee constructed by the defendants was indispensable to the public safety. That the location of it nearer the river, considering the extremely caving character of the bank, would not have justified the large expenditure of upwards of twenty thousand dollars, which the parish was obliged to incur, for this public protection. That the levee proposed in 1847, but never executed by the police jury, was injudiciously located, as proved, among other things, by the fact that seventy yards of it had already fallen in the river, and therefore was properly abandoned, and can have no influence upon this suit. The police jury had a right to fix on the present location, and a reasonable regard for the public safety required it, and therefore the plaintiff has no right to complain. *Salus populi suprema lex est* is the rule, and in the exercise of it, individuals can claim indemnification only when they are able to show, clearly, that they have been deprived of their rights. It is not shown in this case, and we think there should be judgment for the defendants.

The judgment of the district court is reversed, and that there be judgment in favor of the defendants, the plaintiff to pay the costs in both courts.

### R. C. KING, Tutor v. A. G. BOWEN et al.

Where the whole account has been referred to an auditor, it is error in the court to permit the counsel to divide it and try the case on a portion of it.

Where a party seeks to homologate the report of auditors, and, in his motion, makes reservations which leave the matters upon which the report is based, vague and uncertain and open to future litigation, a judgment homologating it will be equally vague and uncertain, and should not therefore be rendered.

Items paid by a tutor, in the course of his administration, are considered *prima facie* as proper charges against the minor he represents. Where there are circumstances which cast a suspicion upon his good faith, it is otherwise.

**A**PPEAL from the District Court of Concordia, *F. H. Farrar, J. Thomas P. Farrar*, for plaintiff. *Stacy and Sparrow*, for defendants. By the court:

ROSE, J. The defendant, *Bowen*, was removed from the tutorship of the minor, *Thomas McAlister*, and *Rodney C. King*, the tutor appointed in his place, instituted the present action against him and *James Miller*, his surety on his bond, to compel them to account.

The defendants appeared, and *Bowen* filed an account of his administration, which he subsequently amended at various times. In the original and amended accounts, the personal expenses of the minor and those of two plantations in which he had an undivided interest jointly with *Bowen*, were all included.

By consent of parties, these accounts were referred to *Zebulon York*, as auditor, to examine and state the same separately. At the ensuing term of the court, the auditor reported, but, by consent, the accounts were referred back to

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him with authority to take testimony. At a subsequent term of the court, the auditor again reported, and the defendants' counsel moved to have the report homologated, and made the judgment of the court, reserving, at the same time, the right of *Bowen* to be allowed the amount charged in his amended account, filed 19th November, 1850; and further, stating that the account referred to the auditor, was not his final account, but only his account up to this day of                      and year                      , with such errors and omissions as are stated in his amended account, or may be shown hereafter.

The plaintiff opposed the homologation on the ground, that the items charged were either not due, or not chargeable to the minor. On the issue thus made, the court rendered the following judgment:

"The law and the evidence being in favor of the accountant, *A. G. Bowen*, it is ordered, that his account embracing the years 1839, 1840, 1841, 1842, 1843, 1844, 1845, and 1846, be confirmed and homologated in each and every item, except one of \$60 for medical services for the year 1839, in voucher number 7, and the sum of \$9 68 for a box of sperm candles in voucher 58. It is further ordered, that the matters in relation to the other accounts, filed herein by the said *Bowen*, be continued."

The motion to homologate with the reservations it contains, leaves every question in the case open for future litigation, and the judgment based upon it, necessarily partakes of its vagueness and uncertainty. It adjudges no specific sum, and instead of homologating the report of the auditor, homologates the amended account of *Bowen*, while *Bowen* reserves, by his motion, the right of being allowed the amount charged in his amended account.

The whole account had been referred to the auditor, and the court erred in permitting the counsel to divide it, and try the case on a portion of it only. Such a course is calculated to protract litigation, and might have consequences ruinous to the minor. After the tutor had been removed, he should have rendered his account without unnecessary delay. A knowledge of his entire administration was necessary for a correct decision of the case, and the course which Mr. *Bowen* has adopted, is calculated to weaken the presumption of good faith; in consequence of which, sums paid by a tutor in the course of his administration, are considered *prima facie* as proper charges against the minor he represents. See the case of the heirs of *Frampton*, 3 R. R. 286.

It is ordered, that the judgment in this case be reversed, and the case remanded for further proceedings according to law. The plaintiff and appellee paying the costs of this appeal.

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### ELISE DELAMOUR v. AUGUSTI V. ROGER.

The circumstance that the plaintiff is a concubine of her copartner, does not deprive her of an action for the settlement of its affairs and a participation in profits, derived by capital and labor, which she contributed.

**A**PPEAL from the Third District Court of New Orleans, *Kennedy, J.*  
*Miles Taylor*, for plaintiff: First. Partnership is a contract made between two or more persons, to place their money, effects, labor, and skill, or some, or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them. Story on Partnership, No. 2. Civil Code, 2772. *Purdy*

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*v. Flood*, 5 N. S. 629, 630. It may be made between all persons capable of contracting. C. C. 2773. We have no knowledge of any law or principle of law, by which a single woman is rendered incapable of becoming a party to such a contract. Married women are, in general, incompetent to become so, but the rule with respect to them is subject to many exceptions. In all the instances in which this is permitted, it is stated that they are authorized to do so as "*a feme sole*," to use the language of the common law. Story on Partnership, Nos. 10 to 14, C. C. 1779.

The business which was carried on was lawful and proper. A partnership formed with a view to its prosecution between two men would be perfectly legal, and it is not easy to conceive why it should be any the less so because one of the parties was a female.

Second. The plaintiff is the joint and equal owner, with the defendant, of all the real estate and slaves, and stock in trade acquired and held in his name, and of the debts due to him. C. C. 2779, 2782, 2824, 2825. C. C. 2836. *Richardson v. Packwood*, 1 N. S. 290. 4 *Skilman v. Purnell*, 3 L. R. 497.

There may be two or more different contracts between the same parties, and one may be valid whilst the others are null and could give no rights. Now, the defendant says that the plaintiff lived with him in a state of concubinage, and that there was no other cause or motive for their apparent connection. We have shown that there was another cause for that connection, and that it was of a nature that continued to operate upon and influence the parties in such a manner that all their exertions and industry were directed to a common object, that of making the business they were associated in profitable, not only whilst they were separated and lived apart for a year or more in 1831 and 1832, and for about six months in 1836, but during the whole period which elapsed from the time the defendant left the plaintiff in France, in 1844, and when they not only lived apart, but the defendant lived and cohabited with other females. No matter how improper the cohabitation of the plaintiff with the defendant might have been, it could not, under any circumstances, have any effect upon a separate and distinct agreement of the kind we have shown, with respect to the prosecution of a lawful business, to the establishment and prosecution of which the plaintiff contributed all the pecuniary capital, and furnished at least an equal proportion of the industry, care, attention and economy necessary for its success.

All the circumstances of the case show the entire validity of the association of the parties in the establishment, and prosecution of a common business. If, however, this admitted of doubt, in the absence of proof to the contrary, "illegality in a transaction is never presumed; on the contrary, every thing is presumed to have been legally done, until the contrary is shown." 1 Chitty on Pleading, 220. And it is a well founded principle of law, that when an act may have been determined by two motives, one praiseworthy, and the other illicit, it must be considered to have been determined by the praiseworthy one. 2 Delvincourt, p. 203, No. 3. Paillet note g. 1 to art. 1108 of the Napoleon Code. 3d Ann. 239, 157, 494.

But in the present instance there is no room for doubt. The facts show clearly that the association in business had a lawful purpose.

The defendant's counsel seem to have confounded this action with another that it has no relation to. He would have it considered as if it were an action to enforce the payment of an obligation, given in consideration of the illicit cohabitation of the parties. But every obligation, founded upon such a cause, is not void. One given in consideration of future illicit intercourse is certainly so. But past cohabitation has been held to be an innocent consideration in England, and where the common law prevails. Chitty on Contracts, ed. 1842, p. 660, 1. The same doctrine is maintained in France. *Repertoire du Journal du Palais*, vol. 9, p. 743. It is true that in many cases our courts have refused to enforce notes and other obligations given by men to females, who had lived with them in a state of concubinage, but in every instance it has been upon the ground that there was a want of consideration. We know of no principle which would prevent one who had lived in concubinage with another, from recovering against him upon a cause of action founded on an actual consideration furnished by her to him. In the only cases which has occurred in our courts, that of *Vienne v. Brickie*, 8 M. R. 11; and of *Labanelle v. Decorret*, 2d Ann. 546, the right was recognized and enforced.

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*Graihle and Randel Hunt*, for defendant: The allegations of plaintiff show evidently, that the motive or cause of their co-residence was the concubinage. If the court are of opinion that such was the motive, consideration, or object of the parties, when they first met together, then the peremptory exception filed must be sustained, and there must be judgment for the defendant. L. C. 1887, 1889, 1890, 2026.

An obligation without a cause, or with a false or unlawful cause, can have no effect. C. C. art. 1887.

By the cause of the contract, in this section, is meant the consideration or motive for making it, &c. C. C. 1890. 17 L. R. 126. 3 N. S. 46. 1st Ann. 69. Duranton, vol. 10, No. 367.

The judgment of the lower court recognizes a universal partnership between the parties. We maintain there was an insuperable obstacle to the formation of such a partnership between these parties. C. C. art. 2805 provides that: "a universal partnership cannot be created without writing signed by the parties, and registered in the manner hereinafter prescribed." C. C. art. 2817, 2818, 2819.

C. C. art. 2804 provides as follows: "Universal partnership shall only be contracted between persons who are not respectively incapacitated by law from conveying to, or from receiving from, each other to the injury of others."

C. C. art. 1468 is in the following words: "Those who have lived together in open concubinage are respectively incapable of making to each other, whether *inter vivos* or *mortis causa*, any donation of immovables; and if they make a donation of movables it cannot exceed one-tenth part of the whole value of their estate. Those who afterwards marry are excepted from this rule."

The spirit of that law is of public order, and to laws of that kind, parties cannot derogate. Every thing done in contravention to a prohibitory law produces no effect, and is absolutely null. C. C. art. 12.

In a case like the present, parties must be left in the condition in which they place themselves: "*Melior est conditio possidentis*," or "*Porro autem si et dantis et accipientis turpis causa sit; possessorum potiorum esse, et ideo repetitionem cessare, tam et si ex stipulatione solutum est.*" Leg. 8, § de conditione ob turpem, 12, 5.

If the judgment of the lower court was confirmed it would be the corner stone of a new jurisprudence in favor of concubinage; a premium to the concubine over the legitimate wife. 1. In marriage, the husband is the head and chief of the community property, which he can alienate at pleasure. 2. The wife has no right of action, against her husband, for the purpose of dividing the community property, except in cases of separation of bed and board or of divorce. 3. The legal community is to last as long as the marriage, unless the husband mismanages the wife's private property. 4. During marriage, the wife could not form a commercial partnership with her husband. 2 L. R. 268. 5. Could she do it with her husband and concubine jointly?

By the court:

PRESTON, J. The evidence leaves no doubt of the conclusions to which the district court arrived in this case. 1st. That if the parties had been both men or both women, it would have fully established a partnership between them. 2d. That upwards of twenty years ago, in Paris, the plaintiff furnished the little capital with which they began business. 3d. That the plaintiff had contributed equally with the defendant, by her skill and application, to the success of their business. 4th. That the real property in this city standing in the name of the defendant, was purchased with the profits of their business as hair dressers and keepers of a perfumery and fancy store.

The defendant relies on the fact that they lived together during the period the property was accumulating in a state of concubinage, and contends that on that account, the laws give to the plaintiff no action to recover half of the property.

The evidence perhaps justifies the remark of the judge, that the concubinage which was at two periods interrupted a long time by the business, was rather an incident to the business than the reverse.



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ROGER.

Be that as it may, there is a manifest difference between an action for the wages or reward promised in consideration of concubinage, which cannot be maintained; and a suit for property, the result of capital, industry, labor and economy. The evidence gives this character to the present suit, although the life and conduct of the parties was contaminated by an immoral connexion, the continuance of which was attributable more to the defendant than to the plaintiff.

The case in many respects, is remarkably similar to that of *Vienne v. Bickle*, 8 M. R. 11. We will not say, with the Supreme Court in that case, that the cohabitation increases the obligation of the defendant, in a moral point of view, of doing justice to the plaintiff, but we have no hesitation in saying, it does not lessen his legal obligation to do so.

The reasonable effect of article 2804 of the Civil Code, is to render the participator in concubinage incapable of recovering, as a universal partner, one half of the property acquired, although her labor may have contributed nothing towards its accumulation; but, when her capital and labor has contributed a full share towards the result, equity entitles her to half the property acquired.

In addition to this, the defendant, in his numerous letters to the plaintiff, speaks not only of "our commercial house," but of "our houses," "our property" and "our rents," which he anticipates will be sufficient to support them comfortably in retirement in their old age. Some of these letters are sufficiently particular in description, to establish a legal title to certain properties and slaves as between the parties, and even as to third persons, if they had been recorded, and the knowledge that the parties were not man and wife, had been made public.

The possession of the defendant cannot prevail against the frequent and long continued acknowledgment of joint ownership, based upon so much equity. It amounts to a legal title to half the property, supported by an equitable ownership, and no principle of law or morality requires us to reverse the judgment of the district court.

There was an error (we supposed clerical) in the judgment, in decreeing the whole property to the plaintiff. We have left the case open for the correction of this matter. But as it has not been done, we are obliged to reverse the judgment, at the costs of the plaintiff.

It is decreed, that the judgment of the district court be reversed; and it is further decreed, that the plaintiff recover from the defendant one undivided half of the property described in the judgment of the district court, and that the judgment, in all other respects, be affirmed; and that the plaintiff be condemned to pay the costs of this appeal.

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### JOSEPH WILSON v. H. C. CAMMACK & Co.

Defendants chartered a ship from plaintiff, and bound themselves to furnish a full cargo; instead of so doing, they notified plaintiff that they considered themselves absolved, and that they would not furnish the cargo. The measure of damage is not necessarily the amount of freight upon a full cargo, but the damage actually suffered, in view of the state of things which existed at the time of the notification.

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v.  
CANNACK.

**A**PPPEAL from the Third District Court of New Orleans, *Kennedy, J. Benjamin and Micou*, for plaintiff. *E. A. Bradford and Edward Briggs*, for defendants. By the court :

PRESTON, J. In March 1850, the defendants chartered the ship *Loodianah*, and agreed to furnish a full cargo of cotton from this port to Liverpool, and pay freight at the rate of seven sixteenth's of a penny per pound.

The plaintiff stipulated for five days notice of the defendants' readiness to load, and obligated himself to take the cargo on board in fifteen days. This notice was given on the 26th of March, and, on the 30th, the agents of the plaintiff answered, that they were prepared to receive the cargo as fast as required within the time specified in the charter party.

On the 1st of April, the defendants informed the plaintiff, that they were ready to send the cargo on board, but as the vessel was not ballasted and in a fit condition to receive cargo, they considered the charter party as forfeited by his default, and should act accordingly. On the 2d of April, the plaintiff tendered bond to perform the conditions of the charter party. On the 3d, the defendants answered that they considered the charter party forfeited, and had disposed of the cotton intended for the ship. On the 11th of April, the plaintiff informed the defendants, that he would hold them accountable for his loss, but would dispose of the ship for the best advantage, not being desirous to claim a loss which may be avoided.

He now sues for the whole amount of the freight on a full cargo of cotton, from New Orleans to Liverpool. The defendants plead that the charter party became forfeited by the default and breach of the agreement on the part of the plaintiff, and that they are not liable to him for freight or damages.

The case presents questions of fact alone. We think with the district judge, who has analyzed the testimony minutely, that the evidence preponderates in favor of the plaintiff, and shows that he was ready, willing and able to have complied with the terms of the charter party. If freights had greatly risen, and the plaintiff had refused to take the cargo at all, or within the fifteen days allowed for so doing, we assuredly, on the testimony before us, would have considered him liable to the present defendants for all the damages they would thereby have suffered; and for the same reason, think them liable to him for the damages he has suffered.

We cannot, however, concur with the district court in giving the plaintiff his whole net freight, nor is it necessary, as urged by the counsel of the defendants, to require from the plaintiff an account of the profits he made by the subsequent voyage, being released from the engagement to Liverpool; though, certainly his last letter to the defendants indicated his intention to do so. As the defendants did not accept his proposition, they cannot call for his compliance with it; and as the plaintiff has not given an exact account of that voyage, we cannot take for granted that it produced nothing.

We think, then, that the damages for the failure of the defendants to comply with their contract, can and ought to be determined by the state of things which existed at the time they notified the plaintiff that they did not feel themselves bound by it.

They had agreed to pay seven sixteenth's of a penny per pound for the freight of the cotton. It is sufficiently shown by the evidence, in fact the plaintiff has filed a document showing it himself, that when the breach of the contract took place, the current rate of the freight of cotton from this port to Liverpool, was five sixteenth's of a penny per pound. Therefore, the plaintiff was necessarily

subjected to the loss of an eighth of a penny per pound, with five per cent primeage, by the terms of the charter party, but not necessarily subject to any more.

We think, from the testimony, 2700 bales or 1,269,000 pounds of cotton, was a fair and reasonable cargo for the vessel.

The loss of the plaintiff calculated from these data, amounted to two thousand eight hundred and thirty dollars, which the defendants are liable to pay.

The judgment of the district court is reversed; and it is decreed, that the plaintiff recover from the defendants, the sum of two thousand eight hundred and thirty dollars, with interest from this date, and costs in the district court; and that the plaintiff and appellee pay the costs of this appeal.

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v.  
CAMMACK.

### PARHAM and LOWRY v. S. M. COBB and O. B. COBB and W. H. HARRIS.

The bond given by one partner to obtain an injunction against his copartner, is the property of the latter, and not of the partnership.

The right of action upon the bond arises immediately upon the dissolution of the injunction.

The death of the principal in an injunction bond, is no reason for arresting the suit against the surety: his is a solidary obligation.

Where the condition of the injunction bond given by the obligors, is to pay such damages "as the defendant may recover against them," the phrase "may recover against them," applies to the surety in the same manner as it does to the principals. Recovery against the principals is not a prerequisite, therefore, to an action against the surety.

**A**PPEAL from the District Court of the Parish of Madison. *Richardson, J. Snyder and Hynes*, for plaintiffs. *William Perkins*, for defendants. By the court:

PARSON, J. The circumstances out of which the present suit originated, are stated, with some detail, in the case of *Cobb and Husband v. Parham and Lowry*, 4th Ann. 148.

This court affirmed the judgment of the District Court for the parish of Madison, dissolving an injunction obtained by *Mrs. Cobb and Husband*, against the execution of an award of arbitrators and amicable compounders of suits and controversies which had existed between them and *A. J. Lowry* in relation to a plantation and slaves, and the crops thereof, held in joint ownership by them. The award had been homologated by the court, and *William S. Parham*, in pursuance of its terms, appointed agent of the parties to carry it into effect.

To obtain the injunction, the plaintiffs gave bond, with the present defendant, *A. H. Harris*, as their surety, in the sum of three thousand dollars. In dissolving the injunction, the district court, by its judgment, which was affirmed by this court, reserved the right of the defendant, *Lowry*, to sue for damages, or upon the injunction bond if he chose.

The present suit is brought upon the injunction bond against *Mrs. Cobb and Husband* and their surety, the plaintiffs alleging that they have suffered damages to more than the amount of the bond in consequence of the injunction. *Mrs. Cobb* died during the pendency of the suit. Its prosecution has been continued

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COBB.

against *Harris*, the surety. Judgment has been rendered against him for the amount of the bond, and he has appealed.

It is contended that, by the terms of the bond, he is liable only for the amount which *Lowry* may recover against *Cobb and Wife*, his principals; that no judgment has been rendered against them, and, therefore, none can be had against the surety.

The terms of the bond referred to, are thus expressed: "Now, the condition of the above obligation is such, that if upon the trial of this suit it shall be decided that the injunction obtained is illegal, and unjust and contrary to law, and if the said *S. M. C. and A. B. Cobb and William H. Harris*, shall well and truly pay and satisfy all such costs and damages as the said *Parham and Lowry* may recover against them in case it shall be decided that the said writ of injunction has been wrongfully obtained, then this obligation to become null and void, otherwise to be and remain in full force and virtue." It is said, by these terms, there can be no judgment against the surety until there be a recovery against the principals.

The peculiar terms of this bond which gives rise to the argument are these: "Such damages as *Parham and Lowry* may recover against them." The accusative pronoun, them, refers to *Harris* as well as *Cobb and Wife*, and all being bound in *solido* does not affect the right of recovery against either. The phrase "may recover against them," considering the object of the bond, means the right to recover, rather than the fact of recovery. It is surplusage in the instrument, and if it throws any obscurity upon it we must refer to the condition of the bond required by the Code of Practice in order to obtain an injunction, and thus remove the obscurity by the legal condition of injunction bonds, to which, it is the presumption of law, that the parties intended to obligate themselves. "In order to obtain an injunction, the party applying for the same must annex to his petition his obligation in favor of the defendant for such sum as the court may determine, after having examined what injury the defendant may sustain from such injunction, with the surety of one good and solvent person, to secure the payment of such damages as may have been sustained by the defendant in case it should be decided that the injunction had been wrongfully obtained." Art. 304. This is substantially the condition of the bond in the present case, and neither more nor less.

The death of *Mrs. Cobb* is no reason for arresting the suit against her surety. They bound themselves in *solido*, and the surety is liable severally for the amount of the bond, if damages have been suffered to that amount.

It is next contended, that *Lowry and Mrs. Cobb* were partners in the plantation and slaves, and that the damages claimed in this suit grow out of the partnership; that therefore the partner cannot sue for them alone, but only for a general settlement of the partnership. The award of the amicable compounders fixed the mode in which the partnership should be conducted. The injunction was obtained in violation of the award. It was, therefore, a violation of the rights of the other partner, sanctioned by a judgment of that character that commands the most favor with all men. Now the bond required, in order to obtain an injunction against a judgment, is provided by law, in order to place the parties in *status quo*, if it should be decided that it was unlawfully obtained. If the injunction has caused the plaintiffs' damages, the parties are not in the situation in which they were before the injunction. Yet, it is an equitable writ, and he who claims equity must give assurance that equity shall be done. It would not afford an equitable indemnification that the partner, whose rights being judicially

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ascertained, are afterwards violated by an injunction, should merely have a claim for damages at the winding up of the partnership.. On the contrary, as soon as the injunction is dissolved, the bond given for this equitable process should place him in the situation he was before the injunction issued. The long and ingenious argument of the defendants' counsel, on this subject, tends to this conclusion alone, that the bond is an asset of the partnership, which cannot be sued upon by one of the partners. We think, on the contrary, that it belongs to the defendant in injunction alone, and is given to him by law, to indemnify him against the losses he has sustained by the injunction of his rights, unjustly obtained,

Arriving, then, at the merits of this controversy, we will state the objects of the parties in forming the partnership, and the means of accomplishing that object, in the clear and precise manner stated by their amicable compounders. It is somewhat lengthy, but that statement and a very short examination of events, subsequent to the award, will be decisive of the present case.

They say : " The evidence has developed circumstances that render it now impossible that the contracts (by which the parties became joint owners of the plantation and slaves, and regulated their partnership,) can be executed in the precise manner contemplated by the parties, whether we adopt the construction contended for by one or the other. But there are considerations that entered into and made a part of those agreements, and which, we believe, were a moving cause to the making of them, and deemed by both parties essential to their mutual interests and common protection, which we cannot overlook, and which we feel bound by every principle of justice and equity to enforce to the fullest extent of the powers conferred upon us."

" At the date of the sale, in 1843, of an undivided half of the property by *Mrs. Cobb* to *Lowry*, she was indebted to him in a large amount of money, some forty thousand dollars, the payment of which he did not consider secure. The property owned by her, and sold to him, was mortgaged to *Burke, Watt & Co.* and to the heirs of *Edward Mitchell*, for upwards of forty thousand dollars, an amount sufficient, at that time, to have sacrificed, at a forced sale, the whole or a large portion of it. *Lowry* had a small force which he could put upon the place. On the one hand, *Lowry* was in danger of losing the whole or a large portion of his debt, in consequence of the mortgages existing on the property of *Mrs. Cobb*. On the other, she was almost sure of losing the whole property from the combined claims of *Lowry* and the mortgage creditors.

" Hence it was natural that they should have made precisely such an agreement as they did make on the 10th of April, 1843, by which she sold to *Lowry* the undivided half of the Buckhorn plantation and slaves, and received as a consideration the release from the heavy debt owed by her to him, and also acquired a title to the undivided half of sixteen slaves, thus creating an additional force for the plantation, and increasing its revenues and augmenting her ability to liquidate the mortgage debts. By this sale she released herself from one heavy burthen, and increased her ability to raise the others.

" But she was not yet safe, neither was *Lowry*, as the mortgages bore upon that part of the property that had been sold to him by *Mrs. Cobb*. It was liable to be swept from him by the mortgage creditors ; if so he lost his debt.

" But the parties had now acquired the means, which if jointly and properly applied, would avert the consequences they both dreaded, the loss of his debt by the one, and the loss of her property by the other. By adopting the course they did, they believed that all the debts could be paid and the property saved.

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"Hence, it was agreed that, 'all the aforesaid property should be used and cultivated jointly, and that the proceeds of the crops of the said plantation should be applied to the liquidation of the debts against said property.' For the portion of the crops belonging to *Lowry*, so applied, he was to be secured in the manner we shall hereafter state."

They then decide that a subsequent agreement, made in 1844, did not materially vary the first, and proceed: "Considering, then, that the agreement made originally between the parties, that the whole net revenue of the property should be applied to the extinction of the mortgage debts upon it, which, though not nominally against *Lowry*, yet might be made to cause the destruction of his debt, to have been made for their joint interest, and to have constituted an important element in their contract, we feel bound to have that agreement executed to the extent of our power, in the manner hereafter stated."

They then decide and settle many particular controversies between the parties, and continue: "Proceeding to carry into effect, to the extent of our ability, the original intentions of the parties, we order and direct that all the property constituting the Buckhorn plantation, the slaves thereon owned by the parties jointly, and every thing else belonging thereto, shall be kept together and cultivated as a whole until the first Monday of January, 1850." They provide at that date for the partition of the land and some of the slaves.

And then declare: "We divest from this date the said *Alfred J. Lowry* and the said *S. M. C. Cobb*, and her husband *O. B. Cobb*, of all personal right, authority and control over the said Buckhorn plantation, slaves, &c., and every thing appertaining thereto, both as relates to the management of said property and its cultivation, the control and disposition of its proceeds and revenues, and the manner they shall be applied and appropriated, and prohibit them from claiming or drawing any portion thereof, except a thousand dollars annually each, for their individual use."

"We nominate and appoint *William S. Parham, Esq.*, of the parish of Madison, and authorize him to take and have, from this date, the full, entire and complete control, management and administration of said Buckhorn plantation, slaves, &c., independent of and from any and all authority, control or dictation of the said joint owners or either of them, or of any one else, subject only to the rules herein laid down for his guidance for his duty to the parties and to the laws of the State,"

After prescribing some rules, it is said: "The crops shall be shipped and the accounts kept in the name of the Buckhorn plantation, *William S. Parham* agent. The plantation expenses shall be paid; an annual salary of \$750 allowed to *Parham*, and, as stated, a thousand dollars each, annually, to *Mrs. Cobb* and *Lowry*, and the balance remaining of the crop shall be appropriated annually and as soon as realized be paid over and credited upon the mortgage debts of *Mrs. Cobb*. *Parham* was required to render annual accounts on the 1st of March, 1848, 1849 and 10th of December, 1849."

"And within fifteen days after the rendition of each of said accounts, the said *Mrs. Cobb* and her husband are required to execute a special mortgage, before a notary of the parish of Madison, on her entire interest in the Buckhorn plantation, slaves, &c., in favor of *Lowry*, to reimburse to him such amount of the proceeds of the crops belonging to him as may have been appropriated to the payment of the aforesaid mortgaged debts, with six per cent. interest, from the date of the appropriation."

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Provision was afterwards made for the final settlement of the accounts of the partnership, partition of the slaves and other particulars.

The award was rendered in March, 1847, was homologated by judgment of the court in the fall, and was fully carried into effect that year. And had it been carried out, the parties, no doubt, would have had a large estate unencumbered with debt, except the accounts and indebtedness between themselves, to divide at the times and upon the terms provided for by the award.

In January, 1848, *Cobb and Wife* totally repudiated the award. Obtained and issued their injunction against any control or management of the plantation and slaves by *Parham* or *Lowry*; took possession of all the property, and kept the proceeds of the whole crop of that year.

These proceeds should, under the award, have been sacredly applied to the payment of their debts, for which the property of *Lowry* as well as their own was specially mortgaged, and they should have given a special mortgage on their part of the property, in favor of *Lowry*, for his half of the proceeds of the crop. He did not even receive out of the crop, the thousand dollars provided for his family supplies.

*Mrs. Cobb* and husband having thus obtained possession of the property and its proceeds, in consequence of the injunction, and having failed to appropriate them according to the award, now that the injunction is dissolved, are bound, with their surety, to the extent of their bond, to supply and make that appropriation.

Instead of appropriating the crop of 1848 to the payment of the mortgages against the property, *Cobb and Wife*, during the pendency of their injunction, submitted to the jurisdiction of the courts in New Orleans, and confessed judgments in favor of the mortgagee creditors. They thus not only failed to diminish the claims, by the crop of 1848, but voluntarily aided to defeat the very object of the partnership with *Lowry*, and of the award of their amicable compounders. And executions were issued, evidently by their consent, against the partnership property, for their individual debts, with a view to sacrifice their partner.

But, as the day of sale approached, adverse circumstances occurred; the cholera was prevailing on the plantation. *Cobb* was sick; he had not the proceeds of the crop of 1848, even to the extent of \$8000, which it appears might have relieved him; his friends deserted him, and he could not make arrangements with his creditors whom he had facilitated, by subjecting the property of his partner to their executions.

On the other hand, wealthy friends came to the aid of his partner, and purchased the property, no doubt, with the view of letting him have it when he reimbursed them the price. The violation of the award of the amicable compounders, and attempt to ruin their partner, will probably ruin *Cobb* and his wife's estate, while it only straitened the defendant in their injunction, and subject him, temporarily, to the generosity of his friends. The loss of the one, and the possibility that the other may finally relieve himself from the consequences of the injunction, cannot be considered in fixing the immediate and direct injury to the defendant in the injunction.

As the partnership property, sold for the debts of *Cobb and Wife*, was fairly appraised at \$68,300, and was sold even at twelve months' credit for only \$41,775, showing an immediate loss of \$26,525, it might be a fair subject of inquiry, if necessary to sustain the claim for damages to the amount of the bond, whether

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half this loss should not be chargeable to *Cobb and Wife* and their surety on the injunction bond, which loss amounts to far more than the amount of the bond.

There is no doubt *Parham* would have performed the duties of agent of the partnership property during the year 1848, but for the injunction, and have thus entitled himself to the salary allowed him by the award. There is no evidence that he actually resigned the office. He, therefore, is entitled to the amount of his salary, which is the damage allowed him by the judgment as caused by the injunction.

It is urged that but half the property was sold by the sheriff; that the estate of *Mrs. Cobb* owns half the remainder, and that her representative may compensate the fourth of the crops subsequent to 1848 against the bond, and that her surety may require the discussion of her remaining interest in the plantation and slaves, to indemnify him against liability on the bond.

The sale of at least half the plantation and slaves of the partnership for *Mrs. Cobb's* private debts, has so materially changed the relations of the parties, and must produce such an effect upon the award of the amicable compounders, and the management of the remaining partnership property and final settlement of the partnership, that nothing in relation to these subjects can be considered in this suit. It appears there are suits pending for the regulation of the partnership subsequent to the sale, and for its final settlement. The sale having defeated the original object of the partnership and the award under it, the remaining property and the settlement of the partnership must probably be governed by the ordinary principles of partnership, subject to the acquired rights of the partners.

*Mrs. Cobb's* estate can probably only claim a surplus on the winding up of the partnership, and, if so, the surety can claim no greater right. On these subjects, however, we express no opinion further than to show that the bond has not been compensated, and that the payment thereof cannot be delayed by the surety for the discussion of the property of his principal.

The judgment of the district court is affirmed, with costs.

SLIDELL, J. I had doubts, arising out of the peculiar phraseology of the bond, but have yielded them to the unanimous opinion of my brethren.

### IN THE MATTER OF THE MINOR CELINA, CYROT GENTES, Opponent.

There are somethings, that pass before the eye of a district judge, which cannot be preserved in evidence, and I will not disregard entirely his impressions arising from them when, in his written opinion, they are declared.

Per SLIDELL, J. EUSTIS, C. J., concurring.

I cannot consider the appearance (conduct and manner) of *Gentes*, in the district court, as it is not presented in the form of testimony.

I am inclined to think, that nothing but a decree of interdiction, should deprive a parent of his child on the ground of insanity.

PRESTON, J. ROST, J., concurring.

**A**PPEAL from the Second District Court of New Orleans, *B. Bearegard*, for plaintiff. *Cyrot Gentes pro se*. *L. Castera*, for defendant. The court was divided in opinion.

SLIDELL, J. I have not been able to concur in the opinion prepared by Mr. Justice Preston, and will briefly state my reasons.



*Joseph Higgins* was appointed dative tutor of the minor by the district judge, under the authority of the 396th article of the code, which authorizes the judge to appoint a tutor to a foundling or a child abandoned, giving the preference to the person protecting it. This decree of a court of competent jurisdiction, was rendered upon evidence which is not before us. *Gentes* has, I concede, a right to attack it; but in doing so, he is the actor, and must make out a proper case for withdrawing the child from the custody of the person to whom the decree has entrusted her. The district judge declares, that he did not feel justified in placing the child in the custody or under the control of *Gentes*, from what he had himself seen of him, (I presume he means in the conduct of his own cause in the court below,) from a perusal of his petition, and from the facts disclosed on the trial of a previous case of *habeas corpus*. The testimony on this trial is not before us. But the petition which was prepared by *Gentes* in proper person satisfies me, as it did the district judge, that it was the production of a disordered mind. As to the manner of the petition before the court, I cannot agree with what seems to be the opinion of the counsel for the appellant, that we are to disregard the remarks of the district judge respecting it. Certainly, as a general rule, we are to look to the evidence in a cause. But there are somethings that pass before the eye of a judge that cannot be preserved in the statement of evidence, and yet, which in the search for truth, he cannot conscientiously disregard; nor can we disregard entirely his impressions arising from them, when, in his written opinion, they are declared. We are bound, on the contrary, to receive them with consideration, and derive what assistance from them we reasonably may, in forming our conclusions. For example: If a district judge should declare in his opinion that the manner of a witness on the stand created doubt of his veracity, we, in considering the testimony on appeal, would give great weight to the statement. The judge has in substance declared, that his conviction of the unsoundness of the father's mind is such, that he could not, without doing violence to a sense of duty, grant his prayer to displace the dative tutor and put the child under his control.

I therefore think we should affirm the judgment, which was a dismissal of his petition, without prejudice to his right to renew the application hereafter, should circumstances appear to justify it.

EUSTIS, C. J., concurred with JUSTICE SLIDELL.

PRESTON, J. *Joseph Higgins* alleged that his wife was entrusted by the Recorder of the Third Municipality, with the care of a female child, named *Celina*, about five years of age, which was taken from the custody of *Cyrot Gentes*, on account of ill-treatment; that the child is a foundling, abandoned, and her parents unknown or dead, and that no person was legally authorized to take care of the child.

In conformity with article 296 of the Civil Code, the Second District Court appointed *Joseph Higgins* tutor of the child.

*Cyrot Gentes* immediately made opposition to this proceeding, alleging that the girl was his natural child, whom he had duly recognized and legitimated by an authentic act. He alleged that the recorder had been deceived; that he was giving to his daughter all proper care, and had means to provide for her support, education and welfare, which he had devoted to her, by paying board for her, at the rate of twelve dollars a month. He alleged, that *Mr. Higgins* and his wife were not suitable persons to be entrusted with the care of his child, and prayed that the appointment of *Joseph Higgins*, as her tutor, might be revoked. *Higgins* denied the allegations in the opposition.

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The opponent produced an act before a notary public, by which, on the 3d day of October, 1848, he acknowledged the child to be his natural daughter, and declared that he thereby constituted her his legitimate child.

There is sufficient proof that she is his natural child, and that her mother is dead, and the act of the 24th of March, 1831, authorized her legitimation ; we therefore assume, that the opponent is a father claiming the custody of his legitimate child, and the exercise of his paternal authority over her.

The district court dismissed the opposition of *Cyrot Gentes*, on the ground, that by personal observation of his conduct and inspection of his pleadings, he did not consider him a proper person to be entrusted with the child, considering that his mind was disordered.

The evidence leads me to the conclusion, that whatever may have been the eccentricities of *Cyrot Gentes*, he possesses the affection for his offspring, which nature imprints on the hearts of all men ; that he has treated his child with ordinary care, considering his situation, and that he has means to afford her a support and education ; and I concur with his witnesses, that ordinarily, the best situation of a child, is to be under the paternal power and care of its natural parents.

There are exceptions to this rule, but the law does not recognize them, unless the parent is removed from the tutorship of his child, by formal judicial proceedings.

The father is of right the tutor of his child. Code, art. 274. The tutor shall have the care of the person of the minor. Art. 327. The child owes honor and respect to his father. Art. 233. And as long as he remains under his paternal authority, is bound to obey him in everything, which is not contrary to good morals and the laws. Art. 235. He remains under the paternal authority, until his majority. Art. 234. And cannot quit the paternal house, without the permission of the father. Art. 236.

I cannot consider the appearance of *Gentes* in the district court, as it is not presented in the form of testimony, and inclined to think, that nothing but a decree of interdiction should deprive a parent of his child, on the ground of insanity, whilst there remains a flickering of intellect ; nature prompts the parent to do all for his offspring that he can do for himself, and parental affection is the last instinct that leaves the human mind.

I think the judgment of the district court should be reversed ; the appointment of *Joseph Higgins* as tutor of the minor child *Celina* revoked ; and that she should be restored to the paternal power and custody of her father.

ROST, J. concurred with PRESTON, J.

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## NEW ORLEANS GAS LIGHT COMPANY v. WEBB, Administrator of Stephenson's Estate.

The sale of a litigious right to an attorney not competent to purchase, is a nullity. But the sale does not annihilate the obligation of the debtor of that right ; he is still bound to the vendor. It is the sale of the litigious right, and not the right itself, which the law avoids.

**A**PPEAL from the District Court of St. Helena, Penn. J. J. S. Halsey.  
for plaintiff : What is prohibited ? The sale of a litigious right to certain functionaries. What is the penalty of a contravention ? The avoidance of

that which is done in contravention of that prohibition. What has been done in NEW ORLEANS this case? The purchase of a litigious right. Therefore, it is the purchase of GAS LIGHT CO. the litigious right which is void.

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If there could be any doubt as to the accuracy of this reasoning, or the correctness of this construction, it would be removed by ascertaining how similar expressions and provisions of the code must be construed. The 1139th article has a similar prohibition and a similar penalty. The purchase by a curator of property belonging to a succession entrusted to his administration, is forbidden, under pain of nullity, and responsibility for all damages caused thereby. Nullity of what? Of the purchase, certainly; not of the property purchased.

Permit us to expose the opinions advanced on the other side by an illustration. Suppose that A. sells a slave to B., who furnishes his obligation for the price. Afterwards, the vendor sues the purchaser for a rescision of sale, and for hire and damages, upon allegations of fraud. He obtains judgment, and B. appeals. Pending the appeal, A. sells his right to C., an officer of the court. The judgment is affirmed. C. attempts to enforce the right he has purchased, but is stopped by the plea of nullity, under article 2422 of the code.

If the right be extinguished by the act of selling it, what are the consequences of the theory? Who is the owner of the slave? Not C., because his purchase is null; not B., because there is a final judgment avoiding his title; not A., since his right is lost and extinct. It would be gratifying if the "*acumina ingeniorum*" would favor us with a solution of this difficulty.

E. T. Merrick, for defendant: Art. C. C., 2422, says, that the sale of a litigious right to an attorney, practising in the court in which said right is exercised, is under the "penalty of nullity, and having to defray all costs, damages and interests;" evidently meaning that the rights of the transfer vest in, and that he will recover, unless the penalty is invoked, by the interposition of the exception of litigious right. But the case at bar is still stronger; for the Gas Light Company, after the litigation had ceased, passed a resolution ratifying the transfer, thus doubly investing *Waterston* with all their rights; and, with this investiture of rights, the final decree was passed against him. The Gas Light Company is now, therefore, attempting to exercise the rights then vested in *Waterston*, and is, so far, his "ayant cause," and the judgment against him must be *res judicata*, as to the Gas Light Company claiming subordinate to him. See 10 Toul. No. 211. 12 R. R. 577. *Irish v. Wright*, as to judgment binding upon the "ayant cause."

Second. Every person is presumed to know the law. Art. C. C. 12 announces that, "whatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed." In this respect, our code agrees with the common law, and goes further than the Napoleon Code, which has no corresponding article with No. 12, of our code. Art. No. 2422 has formally decreed the nullity of the sale of a litigious right, to attorneys exercising their functions in the same tribunal. It must follow that the vendor and vendee both stand in the same position; violators of the law, they are in *pari delicto*. So are they viewed by Vinnius, in the passage cited by Troplong De la Vente, No. 196, "*Inter pacta quæ contra bonos mores fiunt memoratur et pactum quo causidicus a litigatore litem redimet et convenit ut, nomine mercedis, certam partem hujus, pecuniæ et quæ adjudicata fuerit vel majorem aliquam summam in eventum litis accipiat.*" Duranton holds the same opinion, that the vendor is an accomplice, on account of the intended vexation to the opposite party. vol. 16, No. 145, and so indeed is he viewed by the civil law, particularly by Lex, Ne liceat potentioribus (Code 2, 14, 2.) which is also embodied in art. C. C. 2422. In using the strong language above, I do not wish to reflect upon the parties to the transaction; I wish only to assert that the thing done is against the prohibitions of law, is *malum prohibitum*. It is not my wish, nor within my province to say more. It seems, then, under our law, to follow, that the Gas Light Company cannot stand in a better situation than Mr. *Waterston* himself. The law will leave the opposer where he has chosen to place himself, in violation of law. It will not interpose its aid. *Gravier's curator v. Carraby's Ex.*, 17 L. R. 131, 143. *Denton v. Wilcox*, 2d Ann. 60. See the case of *Milne v. Davidson*, where the court refused to decree rent for a house let for an hospital in New Orleans, it being against a prohibition of law. 5 N. S. 409. See, also, *John Y. Davis v. James H. Caldwell*, 2 R. R. 271. *Pickett and wife, v. Clark*, 3 R. R. 81. The case of *Mulhollan v. Vookries*, illustrates the reason why art. 2422, was added to the code of 1825. For there both the judge

NEW ORLEANS and sheriff were purchasers. The articles 12 and 2422, C. C., being general, and their provisions being salutary, it is submitted that the court will apply them alike to all cases which come within their letter and spirit.

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The common law authorities are as numerous as our own. See *Patton v. Nicholson*, 3 Wheaton, 204. *Armstrong v. Toler*, 11 Wheaton, 258. *Ex. Cambiso v. Maffei*, 2 Wash., C. C. R., 98. *Craig v. Missouri*, 4 Peters, 410. See also, particularly, *Bartle v. Coleman*, 4 Peters, 184. See also the numerous authorities collected in the United States Digest, vol. 1, p. 110, title Agreement. Validity as against Statutes, vi., sec. vii. on same subject. Also supplement to same work, vol. 1, p. 69, Verbo Agreement, sec. vi.

We urge upon the attention of the court the fact, that the provisions of art. 2422, did not exist in the code of 1808, and is a new provision of law, introduced in 1825, and that it ought therefore to be construed in reference to the other provisions of law then in force, and not in reference to any foreign system of laws in which other principles prevail. 3 Martin, 185. *Agnes v. Judice*, N. S. 164. *Abat v. Waterman*. 6th Ann., 300, *Burrows v. Pierce*.

Again, were this to be made an exception to the general rule, it would place the parties who sell litigious rights to attorneys, in a better position than those who make the like sale to any other person, because, while the sale to such other person could only be enforced for the price actually paid, C. C., art. 2623, yet, in this class of cases, the party would be subjected to a violent prosecution on the part of the attorney, and a renewal of the same litigation by the vendor, without any relief, except the payment in full of a demand, which the party, by his sale to the attorney, admits he is willing to take less for; which is against the policy of the law. *Interest Republicae ut sit finis litium*. Bullard & Curry's Digest, page 21. sec. 4.

By reference to the Code of Justinian, it will be seen that it was the intention of the Lex Anastasiana to benefit the person against whom the litigious right was sought to be enforced, and not the transferor or transferee. So if a person was interposed, or a portion of a litigious right donated, still the transferee could only exact the amount paid, and neither the transferor or transferee could require any thing more, or make any profit from the debtor or his goods. Codex Liber 4, tit. 35, 1, const. 23.

The introduction of art. 2422 into the Code of 1825, is a remedial statute, and should be so construed as to advance the remedy: To favor attorneys or their vendors, in preference to other persons purchasing litigious rights, would not advance the remedy. It would have the contrary effect. C. C., art. 18.

That art. 2422 was intended as a remedial statute, I think will appear by reference to the old code, p. 368, sec. 130, which is the same as 2622, and permitted the sale of litigious rights, but regulated the amount which might be exacted of the debtor. Art. 2422 amounts to a prohibition; it says the thing cannot be done, and denounces the penalty for its violation. All parties consenting to its violation, stand towards the courts in the same relation.

But this court will be urged to follow the modern decisions of the courts in France, and the commentators on the Napoleon Code. In reply I have to say, that, however distinguished for their profound learning they may be, those decisions and opinions are rendered upon a system of laws, in many respects radically different from our own; and this court, their equal in all things affecting the rights of citizens of Louisiana, has asserted the right to construe for themselves, all laws with reference to the customs and habits of the people of Louisiana, and the other laws passed on similar subjects by the legislature. Certainly the ancient decisions in France under the ordinances, are more in accordance with our legislation, and the tenor of American decisions, than those under the Napoleon Code. *Merlin Verbo Droits litigeux*, No. 3.

By the court:

SLIDELL, J. The plaintiff recovered a judgment against the succession of *Stephenson*, which was confirmed, (with the exception of the decree as to privilege,) upon an appeal by the administrator from the entire judgment. The case is reported in 2d Ann. 526.

While that appeal was pending, the company sold its claim to *Waterston*. After judgment was confirmed by this court, *Waterston* instituted proceedings upon the claim thus purchased, against *Webb*, praying for his dismissal from

office, and for a personal judgment against him, for the amount of the judgment obtained by the company, and to him, *Waterston*, transferred. In the progress of that cause, after other pleadings and proceedings, which it is unnecessary to detail, the defendant, *Webb*, plead a peremptory exception, in which he pleaded that *Waterston* could not maintain the action, because his purchase of the claim was the purchase of a litigious right, then in litigation in courts wherein said *Waterston* was then exercising the functions of an attorney at law; and the exception concluded with a prayer, "that his, said *Waterston's*, demand being null, be dismissed." The cause being brought to trial upon the exception, it was decreed "that said exception be sustained, and plaintiff's action dismissed, and that the plaintiff pay the costs." This decree, upon appeal to this court, was affirmed. See *Waterston v. Webb*, 4th Ann. 174.

Subsequently, the *Gas Light Company* filed an opposition to an account rendered by *Webb* as administrator. In this opposition, the company alleges itself to be a judgment and mortgage creditor, by virtue of the judgment rendered in its favor, and affirmed by this court; and that the administrator had neglected to place its claim upon the tableau of distribution. It prayed that the tableau be amended, by placing its claim therein with its proper rank, and also opposed various charges in the administrator's account rendered. Thereupon, the administrator filed what his counsel calls "a motion, in the nature of an exception, to strike out said opposition of the *Gas Light Company*," on two grounds, which, as stated by the defendant's counsel in his brief, are in substance as follows: 1st. That the rights of the company having been transferred to *Waterston*, and being outstanding in him at the time of the final judgment against *Waterston*, were barred by said judgment, which has the force and effect of the thing adjudged. 2d. The *Gas Light Company*, being in *pari delicto* with *Waterston*, in the violation of a prohibitory statute, is left without remedy, and cannot invoke the aid of the law, to relieve itself from the consequences of such violation.

Before considering the objection thus presented, it is proper to observe, that the reinvestiture of the claim in the company is not included in them, and we do not therefore consider ourselves called upon to notice that portion of the defendant's argument, which turns upon an absence of proof, that *Waterston* had abandoned, or retransferred to the company, any interest he may have acquired by the transfer to him, or that they had mutually assented to treat it as a nullity. And it is not for the defendant to complain that he has been held by the district judge, and is now held by a strict construction of his own pleadings; because he has himself, upon technical grounds, excluded evidence showing that the present suit by the bank is in its own behalf; that the sale to *Waterston* was annulled; and that there is no understanding between the plaintiff and *Waterston*, that he should participate in what the company may collect. And we are constrained here to add, that the record of this succession, which has been under the administration of *Webb* nearly thirteen years, contains abundant internal evidence of a disposition to weary out this creditor by delay; and that this course was probably the reason which drove the company to attempt to sell its interest for whatever it could get. The struggles by *Webb* before was to thwart the claim by delay. The attempt now is to annihilate it.

We shall therefore confine ourselves to the ground taken in the exception, and will proceed to consider them, inverting, however, the order in which they were presented by the defendant.

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The art. 2422 of the Civil Code, is in these words : "Public officers connected with courts of justice, such as judges, advocates, attorneys, clerks and sheriffs, cannot purchase litigious rights, which fall under the jurisdiction of the tribunal in which they exercise their functions, under penalty of nullity, and of having to defray all costs, damages and interest.

This article is found under the general title of sale, and under the second chapter of that title, which treats "Of persons capable of buying and selling."

There is another article of the code, which says, whatever is done in violation of a prohibitory law, is void. Art. 12.

The proposition of the appellant, substantially assumes, that the sale of a litigious claim to an attorney at law, practising in the court where the litigation is pending, virtually extinguishes the claim itself. This proposition pushes the penalty of the law, beyond its just and legitimate consequences.

If the purchase by *Waterston*, was an utter and absolute nullity, then no title ever passed out of the company to *Waterston*. But the utter nullity of the sale, surely does not involve the destruction of the thing sold. Such an inference is not only illogical, but monstrous.

But was it a relative nullity? We think it was; that is to say, the debtor could set up the nullity, and avail himself of it, in resisting an action by the purchaser, as being a purchase reprobated by the law.

The thing sold was a litigious right. The law said to this purchaser, you cannot purchase it. If you attempt to do so, you do it under penalty of nullity. Nullity of what? of the purchase. The law avoids, at the instance of the debtor, what is done in contravention of the prohibition. What was done in contravention? the purchase of a litigious right. It is the purchase of the litigious right, which is avoided, not the litigious right itself. The contract of *Stephenson* with the company, was not illegal or void. The judgment rendered in favor of the company against his succession, was not illegal or void. But it was against the law for *Waterston* to buy that claim; and *Waterston*, having made an illegal purchase, was not permitted to enforce the claim so purchased. The door of justice was closed against him, not because the claim he had bought was void, but because he was forbidden to buy it.

It is a sound principle, that the annulling of a right, should result only from a clear expression of the legislative will in the particular case, enunciated in the law, and should not be supplied by the court.

Let us see what has been said by juris consults, upon a similar provision of the Napoleon Code.

The 1597th article of that code, is in these words: Les juges, leurs suppléants, les magistrats remplissant le ministère public, les greffiers, huissiers, avoués, défenseurs, officieux et notaires, ne peuvent devenir cessionnaires, des procès, droits et actions litigieux qui sont de la compétence du tribunal dans le ressort, du quel ils exercent leurs fonctions à peine de nullité, et des dépens, dommages et intérêts.

Upon this article, Troplong, with both eloquence and force, comments as follows: De tels pactes sont en effet honteux et contraires aux mœurs. Ils ne font qu'attiser l'esprit de tracasserie et de litige; ils transforment l'honorable ministère de défenseur ou d'officier ministériel en un trafic sordide, en une vile speculation, sur la position des pauvres plaideurs; ils sont une source de vexations pour les hommes timides, qui se voient aux prises avec des légistes enhardis par l'habitude des luttes judiciaires, animés par l'intérêt personnel, et armés de tous les pièges de la chicane.

Remarquez toutefois que le droit litigieux ne subsiste pas moins, et que le débiteur ne peut se prévaloir de ce trafic deshonnête pour se prétendre libéré. Aucune disposition de loi ne déclare la créance éteinte. Seulement, la cession est nulle et le débiteur peut en requérir la nullité pour se soustraire aux poursuites pleines d'apreté d'un cessionnaire redoutable, et pour demander d'être mis en face de son véritable créancier. Troplong's Vente, No. 196.

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Duranton also says: S'ils l'avaient entendu ainsi, ils l'auraient dit expressément, puisque l'annulation d'un droit ne doit résulter que d'une disposition formelle de la loi, les nullités ne pouvant être supplées par le juge. D'où nous concluons que le droit n'est pas éteint par la nullité de la cession. Duranton lib. 3, tit. 6, No. 145.

The plea of *res judicata* is untenable. The decree in *Waterston v. Webb*, decided that he, being a purchaser of a litigious right, could not maintain an action to enforce it. It shut the door of justice against him, by decreeing in substance, that his purchase was null as to the defendant, but it did not adjudge the nullity of the right so purchased. This suit is brought by another party, and involves other questions, than those decided in that cause. The question there was, shall *Waterston* be permitted to sue? The question here is, is the original debt avoided?

The authority of the thing adjudged, takes place only with respect to what was the object of the judgment (à l'égard de ce qui a fait l'objet du jugement). The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them, against such other in the same quality. Civil Code, art. 2265.

The judgment of the district court is affirmed; the costs of appeal to be paid by the appellant.

### OAKEY and HAWKINS v. SAMUEL WEIL.

When an account has been stated and a balance ascertained, and the account in this condition is presented to the debtor, and he acknowledges its correctness, the creditor may recover the balance of account without producing accommodation acceptances, notes, &c., the payment of which forms items of the account.

**A**PPEAL from the District Court of East Baton Rouge, *Burk, J. J. M. Brunot*, for plaintiffs. *Geo. S. Lacy*, for defendant, cited *Ames v. The People's Telegraph Company*, 5th Ann. 184. By the court:

**SLIDELL, J.** When an account has been stated and a balance ascertained, and the account in this condition is presented to the debtor, and he acknowledges its correctness, the creditor may recover the balance of account without producing accommodation acceptances, notes, &c., the payment of which forms items of the account. See *Greenleaf on Evidence*, vol. 2, sec. 127. *Allain and Tremoulet v. Lazarus*, 14 L. R. 330. *Freeman v. Howell*, 4th Ann. 197.

In this case, the testimony satisfactorily proves, that the account annexed to the petition, and showing a balance in favor of the plaintiff of \$1400 96, was exhibited to, and acknowledged as correct by the defendant's partner. The district judge does not seem to have had any doubts as to the fact of acknowledgment, but appears to have been of opinion that the plaintiffs ought not to have judgment

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without producing the drafts. &c., that they might be restored or cancelled. In this view we think there was error.

It is therefore decreed, that the judgment of the district court be reversed, and that the plaintiffs, *Oakey* and *Hawkins*, recover from the defendant, *Samuel Weil*, the sum of \$1400 96, with interest, as prayed for, from judicial demand, to wit, from the 16th of July, 1851, until paid, and costs in both courts.

### WILLIAM BELL v. The WIDOW BOUNEY.

A person who makes and sells a machine in violation of the rights of the patentee, cannot maintain an action to recover the unpaid purchase money. Nor can the purchaser, who has been prevented by the patentee from using the machine, recover from the vendor the purchase money, where from the circumstances he should have known that the vendor had no right to sell.

**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan*, J. *Race* and *Foster*, for the plaintiff. *L. Castera*, for defendant. By the court :

**PRESTON, J.** In August 1847, the plaintiff made and sold to the defendant a machine for making biscuit, for five hundred and ten dollars, of which he paid \$250. He sues for the balance.

It is proved sufficiently, that it was a machine for which a patent in favor of *John* and *Charles Bruce*, was renewed by a resolution of Congress, approved the 22d of February, 1847.

The defendant denies her liability for the claim, and also, by reconvention, claims the two hundred and fifty dollars paid by her to the plaintiff, and also three hundred and fifty dollars paid by her to the assignee of the patentees, for the right to use the machine.

The last sum, it is evident, she cannot recover. She paid the proper person for the use of a right belonging to him. But the plaintiff has entirely failed to show that he had a right to make and sell the machine called for by *Bruce's* patent.

Now we consider the acts of Congress, giving treble damages as a penalty for violating another's patent, as penal laws, and the act an offence. No one can acquire a right by the commission of an offence.

It appears that the plaintiff has compromised with the assignee of the patentee, for the damages, but that does not legalize his act, or give him any right against the defendant.

The counsel of the plaintiff contends, that he only made and sold the machine, not the right of using it. To give force to the distinction, he should have shown that the defendant knew of the patent at the time, and agreed to buy the machine without the right of using it.

The act of Congress, passed in 1800, prohibits the making, as well as using or selling the thing, whereof the exclusive right is secured to another ; so that the making and selling the machine alone, without the right of using it, was an unlawful act, for which the plaintiff can recover nothing.

We are of opinion, that the defendant, from her vocation, knew, or should have known, that she had no right to buy and use the machine, without the consent of the patentee or his assigns, and that she cannot recover back money paid to the plaintiff for an unlawful purpose.



It is decreed, that the judgment of the district court, be reversed, and that there be judgment for the defendant against the plaintiff's claim, with costs. It is further ordered, and decreed, that there be judgment for the plaintiff against the demand of the defendant in reconvention, with the costs of the same, and that the appellee pay the cost of this appeal.

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THOMPSON G. BIRD v. S. G. LAYCOCK,  
S. G. LAYCOCK v. THOMPSON G. BIRD,  
ADELIA BIRD, wife of S. G. Laycock, v. Thompson G. Bird.

The district court refused to homologate an award, and referred it back to the arbitrators.

*Held*: The judgment is not final, and there can be no appeal.

The court will not set aside an award, upon the allegation, that the amicable compounders misconstrued the deposition of a witness, particularly where the party opposing the award had submitted the deposition, for it was his fault, that he did not obtain more explicit testimony from the witness. Nor will the award be interfered with, on the ground that one of the compounders had in his possession vouchers which would have benefitted the party opposing the award, where those vouchers had been received by the referees, in the course of his business, before the submission; for a party cannot complain, that the referees did not act upon testimony not submitted to them.

**A** PPEAL from the District Court of East Baton Rouge, *Burk, J. Cyrus Ratliff*, for *Thompson G. Bird*. *George S. Lacy*, for *Laycock et al.*

On a motion to dismiss appeal:

PRESTON, J. These three suits were referred to amicable compounders, and all matters in controversy between the parties.

They made their award on 14th of July, 1851. On the 15th, *Thompson G. Bird* filed a petition against *Laycock* and wife, praying that the award might be homologated, and made the judgment of the court. *Laycock* and wife made opposition to it on several grounds. Although ten days may have elapsed after notice to them to oppose the award, they were still in time, as it had not, in point of fact, been closed by judgment. The arbitrators themselves also applied to the court, to refer the award back to them, because some vouchers in their possession, at the time it was made, had been overlooked. The court refused to homologate the award, but referred it back to the arbitrators. *Thompson G. Bird* has appealed.

He cannot do so, the judgment is not final; indeed there is no judgment.

Even if we err in this view of the case, we think there was sufficient reason to refer the award back to the arbitrators. Their award was under the control of the court, not to alter or amend it, to be sure, more than the verdict of a jury, but to grant a revision of it for any good and legal cause.

We think with the district court, that such cause existed.

The appeal is dismissed at the cost of the appellant.

This case was afterwards tried on its merits. By the court:

SLIDELL, J. These parties, having been engaged in litigation with each other, referred all the matters in controversy between them, to *D. D. Avery* and *William S. Pike*, as amicable compounders. After many sittings, at which the parties and their counsel were present, and after hearing oral and written

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evidence, the arbitrators finally returned their award, in favor of *Bird*, for the sum of \$5169, with eight per cent interest, from July 22d, 1851.

Upon a rule taken upon *Laycock* and wife, to show cause why the award should not be homologated and rendered executory, they opposed the rule upon grounds which are also urged by their counsel here. One of them is, in substance, that the arbitrators misconstrued the evidence of *Davidson*, whose testimony was submitted, by *Laycock* and wife, in the form of a deposition. Another was, that at the time of the hearing by the arbitrators and of making the award, *Pike*, one of the arbitrators, had in his possession certain vouchers, which, if they had been brought forward, would have established a further credit in favor of the respondents against *Bird*.

Under the facts disclosed at the trial of the rule, it is questionable whether it would have been consistent with the usual rules of practice, to open the award, even if it had not been rendered by amicable compounders. For if the deposition of *Davidson* was obscure, as seems to have been the case, it was the fault of the respondents that they did not use due diligence, and obtain further and more explicit testimony from him. We infer from the opinion of the district judge, that he thought there was remissness, in this respect, on the part of the respondents; and it was not upon this ground, that he ordered the award to be set aside. It is also proper to observe, that a new deposition of *Davidson*, which the respondents offered at the hearing of the rule, to support the suggestion that the arbitrators had misconstrued his testimony, is, itself, loose and indefinite. As to the vouchers, it appears, from the evidence offered at the trial of the rule, that vouchers did exist for two small sums, amounting to \$138 paid for costs by *Pike*. But it is not pretended those vouchers were offered in evidence before the arbitrators. They seem to have come into the possession of *Pike*, not as arbitrator, but in the course of some anterior business relation in which he acted for the respondents. The respondents should not be permitted to complain, that the arbitrators did not act on vouchers which were never produced in evidence before them, and of the existence of which at all, one of the arbitrators seems to have been entirely ignorant, while the other's knowledge of their existence was unofficial.

Viewed therefore as a case of ordinary arbitration, it would be quite questionable, whether an award prepared after abundant opportunities to produce evidence; after ample discussion by parties and their counsel; and after mature deliberation by the arbitrators, should be set aside on the lame showing made by the respondents. But at all events, it is quite clear, that an award of amicable compounders ought not to be disturbed under such circumstances. This, we think, clearly results from the provisions of our codes on the subject of amicable compounders, and the decided cases.

Our Civil Code, under the title of arbitration, recognizes two classes of arbitrators: "the arbitrators properly so called," and "the amicable compounders." Art. 3076. The following article defines the difference between them, as to the principles by which they are to be guided in the discharge of their duty. "The arbitrators, says article 3077, ought to determine, as judges, agreeably to the strictness of the law. Amicable compounders are authorized to abate something of the strictness of the law in favor of natural equity. Sont autorisés à suévir l'équité naturelle."

Such being the authority of amicable compounders, they are to be considered as in a peculiar degree, mediators of peace. When, therefore, parties embroiled

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in litigation, become alarmed at the prospect of its expense, its delays, its many perplexing, wearisome and irritating incidents, and seek among their friends judges of their own choice, and clothe them with the authority of amicable compounders, they are considered, to use the simple and expressive language of Dumat, as saying to such arbitrators, that each party is willing to abate something of what they hope for in justice, and, for the love of peace, to forego a part of their interests; that they prefer the considerations of peace and quiet, to the rigor of justice, which might leave still occasions of strife and contention.

But while our law regards with favor this mode of terminating differences, it takes care that the object for which the submission is made, shall not be defeated, when the spirit of forbearance and peace which elicited the submission to amicable compounders, has been ruffled in the breast of either party by an adverse award. Therefore, the lawgiver has made a wide distinction between ordinary arbitrators and amicable compounders. "As regards the award of arbitrators, the court may rectify the errors they contain, even though the parties had agreed that such award should be made the judgment of the court, unless the same have been rendered by amicable compounders."

"But if, from the submission entered into by the parties, it appears that they intended to give the arbitrators power to act as amicable compounders, the court cannot revise the award. It must be homologated as it stands, in order that it may have the effect of a definitive judgment." Code of Practice, articles 459, 460.

These articles have been repeatedly the subject of judicial comment. In *Davis v. Leeds*, which appears to have been elaborately argued, Mathews, J., remarks: "The submission in the present case, clearly contains a grant of power to the arbitrators to act as amicable compounders, and, consequently, deprives the tribunals of the country of all authority to revise the award rendered in pursuance of it. Whatever has been done in relation to the matters actually referred to their decision, if done honestly, must remain without the possibility of revision; and as a necessary consequence, without alteration or amendment. Acts done by such arbitrators, having no just relation to the matters in dispute submitted, would be absolutely void, and gross misconduct on their part, exhibiting a want of due respect to common and well established rules in regard to right and wrong, or extreme partiality in their award, would be good causes for setting it aside entirely, if proven to the court, on opposition to its homologation. But nothing of this kind is either alleged or proven in the present instance. The whole of the grounds assumed, in the numerous points presented by the counsel of the defendant, relate to want of precision in the manner in which the cause was laid before the arbitrators, and errors in their award arising from a mistaken view of the facts of the case. If parties will submit their disputes to be decided by men, chosen by themselves as judges, under the appellation of amicable compounders, they must abide their judgments, without hopes of having them revised by the courts of justice established by the Constitution and laws of the State. Such judges are not required to determine according to the strictness of the law. They are authorized to abate something of the strictness in favor of natural equity. L. Code, art. 3077."

So in *Canty v. Beal*, the award of amicable compounders was attacked as being grossly erroneous, but not for fraud or misconduct on the part of the referees. Morphy, J., cites, with approbation, the opinion in *Davis v. Leeds*,

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and adds: "As to any errors alleged to have been committed in this award, even were they as obvious as represented by the appellant, (which, from an inspection of the record, we are by no means prepared to admit) we do not feel ourselves authorized to inquire into them. Whatever has been honestly done, in relation to the matters actually referred to, the decision of the amicable compounders cannot be revised or altered by a court of justice. Code of Practice, art. 459 and 460. L. Code, art. 3077, 3096.

Indeed, the doctrine above enunciated, is as ancient as the *Partidas*. "La otra manera de jueces de avenencia es á que llaman en latin arbitratres, que quiere tanto decir como alvedriadores et comunales amigos que son escogidos por placer de amas las partes para avenir et librar las contiendas que hobieren entre sí en qualquier manera que ellos tovieren por bien: et estos atales despues que fueren escogidos et hobieren rescibidos los pleytos et las contiendas desta guisa en su mano, han poder de oir las razones de amas las partes, et de avenirlas en qual manera quisieren. Et maguer non ficsiesen ante sí comenzar los pleytos por demanda et por respuesta, et non catasen aquellas cosas que los otros jueces son tenudos de guardar, con todo eso valdrie el juicio ó la avenencia que ellos ficsieren entre amas las partes, solo que sea fecho á bona fe et sin engaño. Partida 3, tit. 3, lex 23.

In conclusion, we think with the appellant's counsel, that if such excuses as are presented in this case, against the award of amicable compounders were recognized by courts, it would cease to be that salutary method of putting an end to litigation, which the law contemplates and favors. *Compromissum ad finiendas lites pertinet interest reipublicæ ut sit finis litium.*

It is therefore decreed, that the judgment of the district court be reversed. And it is further decreed, that the award of the arbitrators be homologated and made executory, so that the said *Thompson G. Bird* do recover from the said *Adelia Bird*, wife of *S. G. Laycock*, the sum of \$5169, with eight per cent interest per annum, from the 22d day of July, 1851, and the costs of this appeal, and of the collection of said sum and interest by execution. And it is further decreed, that the costs that had accrued in these above entitled suits, from the 12th March 1850, and in the homologation of the award, including the sum of \$300, the compensation of the arbitrators fixed by consent of parties, be paid in equal proportions by said parties, to wit: one half by said *Thompson G. Bird*, and one half by said *Adelia Laycock* and *S. G. Laycock*, her husband.

### MARY Z. GROVER v. S. M. D. CLARKE.

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The interest of the mother in the estate of her deceased child must be governed by articles 899, 900 of the Civil Code which treat of inheritance, and not by article 1481, which treats of donations. That interest, therefore, is one-fourth and not one-third of the child's estate.

**A** PPEAL from the District Court of West Baton Rouge, *Burk, J. George S. Lacy*, for plaintiff. *Loddell*, for defendant. By the court:

**PRESTON, J.** *Hyram S. Grover*, in his lifetime, entered into a copartnership with *Dr. Nolan* for the cultivation of sugar, upon a plantation owned by them jointly, lying in the parish of West Baton Rouge, which copartnership was in existence at the time of *Grover's* death. It appears from the evidence in the

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ward, that the plaintiff and *Grover* intermarried in the month of February, 1845, and that the latter departed this life on the 16th of October, 1846, leaving the following children his heirs: *Harriet, Pauline, Hiram, Justus* and *James Hamilton*, children by his first wife, and *Mary Estelle* the child of the plaintiff in this action. Previous to his death, he, *Grover*, made his last will, which has been duly probated, whereby he made in favor of his wife, the plaintiff, the following dispositions: "He gave her three thousand dollars for her own use and benefit, and also his barouche and horses. So long as she remained a widow, she was to have the use of the house, yard, &c.; to be furnished with necessary supplies; was to receive three hundred dollars per annum, and have the use of the slaves *Ralph, ———, Caroline, Charity* and *Kitty*."

By the will, *S. M. D. Clarke* was appointed executor and tutor to the testator's children.

Shortly after the death of *Grover*, *Mary Estelle*, his child by the plaintiff, also departed this life, leaving, as her heirs, her mother and half brothers and sisters.

This action was commenced for the rendition of an executor's account, for the recovery of the legacy of \$3000, and the further legacy of \$300 per annum from *Grover's* death until the expiration of the plaintiff's widowhood; for the recovery of the barouche and horses, and to obtain the use of the servants, and of the house, garden, &c., as set forth in the will; for the rendition, by *Clarke*, of his account as tutor of *Mary Estelle*; for the recovery of plaintiff's portion of the estate of her deceased child, *Mary Estelle*, with a decree of partition; and, lastly, to obtain a decree for the interest of the plaintiff in the community of acquets between her and her deceased husband, alleged to amount to \$835 13.

The evidence in the record satisfies the court that the annual allowance of \$300 to the plaintiff, by the will of her deceased husband, has been paid to her during the years in which she remained a widow; and that having married *Edward Boegle*, who joins her in prosecuting this suit, she has lost any legal claim, on her part, for the continuance of that allowance, and has put an end to her right as usufructuary of the house and yard, the negroes *Ralph, ———, Caroline, Charity* and *Kitty*, and the supplies necessary for her use and the use of her family. Her demands in these respects, therefore, must be rejected.

It is admitted, by counsel, that *Clarke* acted as tutor of *Mary Estelle* for a very short time, and during that period he received and disbursed nothing in that capacity. Under such circumstances, he has no account to render as the tutor of the plaintiff's child, and he must be discharged from that portion of plaintiff's demand.

It is contended, on the part of the plaintiff, that judgment should have been rendered in favor of the estate of *Grover*, and against *Clarke*, as executor, for the sum of three thousand and seventy-three dollars and forty-five cents; and, furthermore, it is urged that the community is indebted to the plaintiff in the sum of eight hundred and thirty-five dollars and thirteen cents. The settlement of these claims required the examination of long and intricate accounts, kept by *John R. Shaw & Co.* with *Grover* and *Nolan*; the accounts of *Grover* with *Grover* and *Nolan*; and the accounts of *Nolan* kept with *Grover* and *Nolan*; the investigations of a mass of testimony, and the perusal of a great many vouchers. These accounts, which are complicated and running through a series of years, should have been referred to auditors, and our examination of

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them is not satisfactory to ourselves. The counsel for the parties, at the same time, have pressed upon the court the necessity of a final judgment, and under such circumstances, from the best examination we have been able to give them, and taking into consideration the decision of the district judge, we have concluded to consider the community between the plaintiff and her deceased husband as about balanced as to money claims, leaving on hand, however, the boy *William*, who is found in the succession as community property, to be partitioned as hereinafter set forth; the executor's accounts being approved so far as they are not inconsistent with this decree.

Our attention has been next directed to the claim of the plaintiff for the legacy of \$3000, contained in the will of her deceased husband. It is admitted by the counsel for the plaintiff, in his printed brief, that the deceased was not permitted by law to bequeath in favor of his wife an amount exceeding the tenth part of his estate, or the usufruct of one-fifth part thereof. He contends, however, that the basis upon which the amount must be calculated, is the present condition of the estate, and not the condition which it had at the time of *Grover's* death. We do not think the present case forms an exception to art. 1492 of the Code, and have concluded that "to determine the reduction to which the donation of \$3000, made to the plaintiff, is liable, an aggregate must be formed of all the property belonging to her deceased husband at the time of his decease. The debts due by the estate must be deducted from the aggregate amount, and the disposable portion calculated on the balance." The legacy of \$3000 has been reduced by the district court to one-tenth of the net estate of the testator, at the time of his death, which was fixed by the judge at \$13,200; in fixing which amount, he is fully justified by the pleadings and evidence, and as the one-tenth of the amount is the sum of \$1320, and as the plaintiff does not press her right to the usufruct of the fifth of the estate, the judgment of the district court, on this part of the case, must be affirmed.

The plaintiff, in her petition, claims to be the sole heir of her deceased child, *Mary Estelle*, and prays for a judgment recognizing her as such. In the brief of her counsel, however, she disclaims, under articles 899, 900, 907, 909 of the Code, any expectation of recovering the entire estate of her child, and limits her demand to one-third of the same.

In support of this position, it is argued that when these articles of the Civil Code are placed in contrast with article 1481, it will be seen that the plaintiff is a forced heir of, and, therefore, entitled to a third of her child's estate; and it is said that reason and a proper interpretation of the legislative will, both support the construction given to the code by the plaintiff. In these views we cannot concur with the counsel for the plaintiff. The last article seems inconsistent with articles 899 and 900. These, however, treat of inheritance, which is the subject under consideration, and are explicit.

The article 1481 treats of donations, and does not expressly apply to the present case. Therefore we have concluded, that the interest of the plaintiff in the estate of her deceased child, *Mary Estelle*, must be governed by the arts. 899 and 900 of the code, and is one-fourth, and to that extent she is recognized by the court as the heir of her deceased child.

The defendant has filed an account, in which he has charged the plaintiff for the rent of the dwelling house, out houses, furniture, &c.; for the use of *Caroline, Silva, Ralph, Charity* and *Kitty*; for the provisions and articles of necessary supplies, and for the yearly allowance of \$300 for the years 1847 and

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1848, making the account against the plaintiff amount to the sum of \$2720. From the amount he has deducted \$582, admitted to be a charge in favor of the plaintiff and against the estate, and prays for a judgment for the balance. The use of the property and the annual allowance were given to the widow by the will of the husband; the tutor of the minor, so far from suing for a reduction of the donation in this respect, carried out the will, and, as executor and tutor, the defendant placed the property and funds in the possession of the plaintiff. She received and used the same in good faith, with every reason to suppose that she was enjoying her own property. The executor ought not to be permitted to defeat the wishes of the testator; nor should he, as tutor of the children, be allowed to recover the value of the use of certain property which was not only given as a dying bequest to their father's wife, probably for their benefit, as well as her own, in keeping his family and property together, and which she has been permitted to use and enjoy, without any expectation, on her part, of being called upon to pay for such use. We will say, further, that the contract of partnership with *Dr. Nolan* was a community contract, and rendered this arrangement useful, temporarily at least, if not indispensable to the estate, to prevent controversies and the partition of the estate. The same consideration and principles laid down in the case of *Young et al. v. Carl and Stephens*, lately decided, but not yet reported, justifies us in rejecting the demand of the executor, and also the counter claim for \$582, presented by the plaintiff, as an ordinary creditor. This claim is no where set up in the pleadings, and is established only hypothetically in the account of the defendant, which we have rejected, and therefore the credit must be dismissed with it.

The accounts filed by *Clarke*, as the tutor of the minor children, have been examined by the court, and as the under tutor who represented the minors was notified therewith, and has not appealed from the judgment relative to them, and we can see no objection to them, they must be approved, as *prima facie* at least correct.

For the reasons stated, it is ordered, adjudged and decreed, that the plaintiff's claim against the executor for an alleged balance due by him, and against the community formerly existing between the plaintiff and her deceased husband, with the exception of the slave *William*, be rejected. It is further decreed, that the plaintiff do recover from the heirs of her deceased husband, thirteen hundred and twenty dollars, with five per cent interest from judicial demand until paid. And, moreover, that the plaintiff be recognized as the heir of one-fourth of the estate of her deceased child, *Mary Estelle Grover*, and that the executor do account to her, in that capacity, for one-sixteenth part of the crops of 1847, 1848, 1849, 1850 and 1851, or so much thereof as may be left after paying the debts of the estate and the deduction of charges; and that the matter be referred to a notary public, to make a partition of all the property belonging to the succession of the deceased, the plaintiff to receive one-sixteenth part of the same, the balance to be held jointly by the surviving children of *Hiram S. Grover*, or to be equally divided among them. It is furthermore ordered, that the slave *William*, belonging to the community, be sold to effect a partition, and that the plaintiff do receive from the proceeds arising from the one-half and the sixteenth of the other half of said proceeds; the balance to be equally divided among the said children of *Grover*.

It is further ordered and decreed, that the executor's and tutor's accounts be approved and homologated according to the principles of this opinion; and that the costs of both courts be paid by the succession.

## FLETCHER'S HEIRS v. CHARLES McMICKEN.

No lesion can be predicated of a mere adventure, where there was no deceit, and the parties were equally apprised of the state of facts.

**A** PPEAL from the District Court of East Baton Rouge, *Burk, J. J. M. Brunot*, for *Charles McMicken*, curator *ad hoc*:

*F. Perin*, for appellees. No case has heretofore been presented to the court where they felt authorized from the facts, to order the rescision of the sale on this ground. And yet, in all the cases reported, the right has been clearly recognized. The testimony stands uncontradicted to prove: 1st. That the title of the *Fletchers* to the plantation, was complete and perfect, and that they had possession under that title. Where a judgment has not been reversed or annulled, it must have its full force and effect. 16 L. R. 442. *Patterson v. Bonner et al.* 14 L. R. 233. 2d. That the value of it under that title, was at least \$41,250. 3d. That the defendant never gave one dollar more than \$10,100, knowing the necessity of the sellers to make a sacrifice of their property.

The letters and the implied confessions of the defendant; the deed of sale and testimony of *Mr. Elam* and others, amply establish these facts; and so did the jury and court consider them.

Here is then a clear and indisputable case of lesion beyond moiety, and comes within the provision of the code. Arts. 1854, 2567. "Lesion is the injury suffered by one who does not receive a full equivalent for what he gives in a commutative contract. The remedy for this injury is founded on its being the effect of implied error or imposition; for in every commutative contract, equivalents are supposed to be given and received."

C. C. 1855, 2d clause. "In sales of immovable property, the vendor may be relieved, if the price given is less than one-half the thing sold, &c."

For the rules of ascertaining whether there is lesion, see C. C. 1864, 2567, &c.

If this case is to be governed by the principles laid down in *Copley v. Flint et al.* (16 L. R. 387, and 1 R. R. 128) and *Reviere v. Bossiere*, (5 L. R. 382,) it is conceived that the court will entertain no doubt as to the legality, propriety and justice of affirming the judgment of the lower court. *Beale v. Ricker*, decided Feb. 23d, 1852.

In addition to the code and the decisions of the court, on the subject of lesions, I refer to the following: Lahaye, Code Civil Annoté, p. 743, art. C. N. 1674, Duranton T. 16, No. 435.

"If the purchaser has purchased with a stipulation of no warranty, or if he expressly purchased at his own risk, he may be relieved."

In this case there is a title in complete form, "with an express clause of all lawful warranties." Same p. Troplong, N. 796. "It will not destroy the rights of the vendor of the property, if a greater sum is inserted in the deed than is paid by the purchaser."

If, therefore, there had been forty deeds, expressing a fictitious consideration of millions, the case would be governed by the actual amount paid.

Same, Duvergier, No. 85. "The price paid by the purchaser, and the true value of the immovable, are the two terms of comparison in ascertaining the fact of lesion."

Same, p. 744, under C. N. 1675, Domat, No. 3. "As there is always more or less value attached to things, the estimate of the true value, to ascertain whether there is lesion, should be made at the highest price, at which the thing has been justly appraised, at the time of sale, because this price is just, and the injured vendor should be favored." 1 Domat, p. 228, 3d ed. 1850. See No. 5, on p. 229.

The highest price fixed by *McMicken* himself, is \$70,000. See rule in Domat, p. 933, part 5. ed. 1850—"not granted easily."

*F. G.* and *P. H. Morgan*, for appellant. By the court:

*EUSTIS, C. J.* This appeal is taken by *Charles McMicken*, from a judgment of the Court of the Sixth District, by which the plaintiffs recovered three-fourths'



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interest in a tract of land, situated on the east bank of the river Mississippi, in the parish of East Baton Rouge. The judgment gave the defendant the right to retain the property on paying an additional price, and directed the sum paid by him, to be refunded in the event of his not electing to keep the property. The recovery was based upon lesion, in the purchase of the plantation from the agent of the plaintiffs', by the defendant.

On this appeal, the only question presented, is that of lesion. It is not necessary to notice the complication in which this matter is involved, the parties themselves having no interest in it.

On the 19th of October, 1848, the plaintiffs, some of whom reside in Mexico, and others in Spain, by their agents, *Otham L. Dabestein* and *Bernard Turpin*, in the city of New Orleans, sold to the defendant, *Charles McMicken*, for \$10,100, their three-fourths' interest in the property, also their right, title and interest in a suit, in the Circuit of the United States for this district, against the heirs of *John Davenport*. Drafts were given for the price, which were duly paid.

The jury found the cash value of the property at the time of the sale, to be forty-one thousand two hundred and fifty dollars, thus establishing the lesion in the purchase, to be far beyond moiety. The property in dispute is known as the *Davenport* plantation, memorable in the annals of litigation, and the plaintiffs were adjudged to be the proprietors of three undivided fourths of it, as far back as August, 1832. 4th L. R. 275. A reservation was made in the judgment, which prevented any execution from being had of the judgment, until payment should be made for the improvements, &c. *Fletcher's heirs v. Cuvelier*. 10 L. R. 119.

It appears that on the 25th of June, 1848, previous to the sale to the defendant, the plaintiffs had recovered judgment against the heirs of *Davenport*, in the suit in the United States Court, for their three undivided fourths of the land, and that possession was delivered under said judgment, to the agents of the plaintiffs.

The charge against the defendant of taking advantage of the necessitous circumstances, and of the ignorance of the plaintiffs, and of imposing on them, is without the shadow of evidence. It is clear, that the agents of the plaintiffs, who sold the land, knew its value as well, if not better, than the purchaser, and no reason whatever is assigned for their sale to the defendant. They sold to him, because they found it for their advantage, and could get a better price than from any body else.

We have recently given our views relating to the proof required to establish lesion, in order to avoid a sale. See the case of *Ricker et al v. Beale*, ante.

It is plain, that the value of an undivided interest in an estate, the title to which is drawn in question, is very difficult to be appreciated. In the present case, we deem it sufficient to state, that the lesion is not proved. That the defendant thought he had made a good bargain, and asked a large price for it, proves nothing. What did he make the purchase for except to make money? *McMicken* made a speculation, the result of which remains yet to be ascertained, and the defendants sold, because their agents thought they got a good price. No lesion can be predicated of a mere advantage, where there was no deceit, and the parties are equally apprised of the state of facts.

It is plain, that *McMicken* having bought from the plaintiffs their rights in the suit in the United States Court, the validity of his title is dependent on the ultimate judgment in that suit, in which, even at this day, an appeal may be taken, by writ of error, by the heirs of *Davenport*.

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The judgment of the district court is therefore reversed, and judgment rendered for the appellee, *Charles McMicken*, on the plaintiffs' claim on intervention, with costs in both courts, without prejudice to the rights of the plaintiffs to set aside the sale on other grounds.

### HORACE LOZENGHEIM v. URSULE MARTIN and EVANS, Sheriff.

The judgment of the district court was, that there be a separation of property between the parties, and that the wife recover one half of the property acquired during marriage. In order to effect a partition, the sheriff was directed to sell the property of the community and to pay one-half of the net proceeds to the wife. There was no specification of the community property in the petition, in the judgment of the court, nor in the evidence: nor was there any settlement of the community. The judgment of the district court was held to be erroneous; for, by *Slidell, J.*, the judgment, on which the *feri facias* was issued, did not ascertain what property belonged to the community.

**A** PPEAL from the District Court of St. Tammany, Penn. J. *Griffon*, for appellant. *Jones*, for appellee. By the court (*Preston, J.*, dissenting):

**SLIDELL, J.** In March, 1850, *Ursule Martin* brought a suit against her husband, *Meyer*, for a separation from bed and board, and obtained an order that he be enjoined from disposing of the community property during the pendency of the suit. No writ of injunction issued, but a citation was served upon *Meyer*, in April, 1850. Judgment of separation from bed and board was rendered in favor of the wife, in October, 1850; and the decree further adjudges as follows: "It is further ordered, that a separation of property take place between said parties, and that she recover one-half of the property acquired during the marriage; and to effect a partition, that the sheriff be ordered to sell said community property and to pay one half of the net proceeds of the same to the plaintiff." It will be observed, that this decree does not specify what was the community property; the plaintiff's petition contained no such specifications; the evidence was equally silent on the subject, and no settlement whatever of the community appears to have taken place. Upon this judgment the wife obtained a *feri facias*, in June, 1851, and caused a house and lot of ground, in the possession of *Lozengheim*, to be seized. Thereupon, he brought the present suit to enjoin the sale, alleging that he bought the lot from *Meyer* in September, 1850; has paid the price, and has expended \$400 in improvements. *Mrs. Meyer* answered, admitting the seizure, but alleging that the property belonged to the community which existed between herself and husband, and was lawfully seized under her judgment. There was judgment in the court below, dissolving the injunction, and condemning the plaintiff, and his surety in the injunction, to pay damages. The plaintiff has appealed.

We think the judgment of the district court was erroneous. The judgment on which the *feri facias* was issued, did not ascertain what property belonged to the community. It is uncertain, under the evidence in this cause, whether the property in question was bought by *Meyer* before or after his marriage. The wife should have resorted to an action against the purchaser, and so have that decreed, which her judgment against her husband has not decreed, namely, whether this property is or is not community property.

It is said that the judgment obtained by *Mrs. Meyer* became null, for want of reasonable execution, pursuant to article 2402. Our views above stated, render it unnecessary to express an opinion upon the point.

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It is therefore decreed, that the judgment of the district court be reversed, and that the injunction be perpetual; the costs in both courts to be paid by the defendant, *Ursule Martin*, reserving to her her right to bring an action against the plaintiff to set aside the alienation.

PRESTON, J., dissenting. On the 4th of March, 1850, *Ursule Martin* commenced a suit against her husband for a separation of property, and enjoined him from disposing of their community property during the pendency of the suit. On the 12th of October, 1850, she obtained judgment in her favor, and decreeing, that a lot in the town of Mandeville should be sold, and the net proceeds divided between them. She, however, did not issue execution until the 15th of June, 1851. But, during the pendency of the suit, on the 9th of September, 1850, the husband, in the city of New Orleans, sold the lot to the plaintiff, who alleges that he placed improvements on it before the execution was issued, amounting to \$400. In fact, from some cause, he commenced improving the property before the bill of sale was passed.

The plaintiff contends, that the decree of separation is forfeited, and the community not dissolved, as it has not been followed by a prompt and *bona fide* execution. I am unable to say there has been such neglect on behalf of the wife, in following up her judgment by execution, as to forfeit her rights under the judgment. Third persons can take advantage of the failure of the wife to issue execution on her judgment, only so far as they are injured; and, the district court would undoubtedly provide, in the distribution of the proceeds of the sale of the property, by allowing the plaintiff for any valuable improvement made after the judgment and before execution.

2d. It is contended, that it is not alleged or shown that the parties were married at the time the property was acquired by the husband. I think the evidence leaves no doubt of the marriage; and it appears by plaintiff's bill of sale, that he knew a suit was pending for separation from bed and board. Now, at the dissolution of the marriage, all property is presumed to belong to the community of acquets, and it becomes those who are interested to show the contrary, to prove it.

3d. It is argued that, even if the property belonged to the community, the husband could legally alienate it. He cannot do so after suit brought for a separation of property, and an order of court to the husband forbidding him to dispose of it.

4th. That no injunction was obtained, or notified to the husband, to prevent his alienating the property during the suit. It was not necessary. He was ordered not to do so, and an order accompanied the petition.

The 5th ground taken has no relevancy to the case.

6th. That the defendant cannot be made to profit by a state of things which she has brought about by her own *laches*.

I think that she was neglectful in executing her judgment, and that the court, in distributing the proceeds of the sale, should provide equitably for any value the plaintiff added to the property after judgment and before execution; and, indeed, for any other improvements, so far as they may add to the saleable value of the property, unless it should appear that the plaintiff acted in bad faith, which does not, so far, appear.

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The wife has a right, by her judgment, to the half of the community property ; and, as that in controversy is indivisible in kind to its partition by licitation, that would be the only effect of the execution.

I think the judgment of the district court should be affirmed.

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JEFFERSON and PONTCHARTRAIN RAILROAD COMPANY v. THOMAS  
HAZEUR & Co.

On an application by a railroad company to expropriate lands, if it should appear that the company has already a sufficient quantity for its purpose, the court should refuse an order to summon a jury to assess its value ; and should such an order be improvidently granted, before action upon it, it is proper for the court to rescind it.

Upon such an application it is not necessary for the owner to raise the objection, in his pleadings, that the company has already land enough for its purpose. The court, upon ascertaining the facts, will act upon them and refuse the order, or if granted, rescind it.

The right of expropriation should only be enforced by inches, and upon conclusive proof of the necessity upon which it rests.

**A**PPEAL from the District Court of the Parish of Jefferson. *Benjamin and Micou*, for plaintiffs. *Ogden and Duncan*, for defendants. By the court :

ROST, J. We concur with the district judge, that the plaintiffs have not made out a case which entitles them to the order for which they applied, for the purpose of expropriating the defendants' land. The tract of land which they already own, and through the centre of which the railroad passes, is three hundred and eighty-three feet wide, and has that extent of front on Lake Pontchartrain. Their charter limits the right of expropriation, which it gives them to the width of one hundred feet for the railway, and to such lands as may be necessary for car-houses and other works connected with the railroad. In the absence of all proof to the contrary, the district judge correctly considered the land already owned by them as sufficient for all those purposes.

It is said that the defendants have not raised this objection in their pleadings. We think that when application was made to the district judge *ex parte* for an order summoning a jury of commissioners to estimate the land of the defendants, it would have been his duty to refuse it if he had known, at the time, that the plaintiffs had sufficient land of their own ; and as he ascertained, before any action was had on the order, that it had been improvidently granted, he acted properly in rescinding it and dismissing the petition.

The right of expropriation should only be enforced by inches, and upon conclusive proof of the necessity upon which it rests.

The judgment is affirmed, with costs.

SLIDELL, J. The case came before us on exceptions taken in *limine litis* to a petition for expropriations under a special act. See Acts of 1840, p. 86, sec. 13.

The district judge dismissed the proceeding.

Without expressing an opinion upon other points, I consider it a sufficient reason for not disturbing the judgment, that one of the exceptions is well taken. The survey annexed to the petition does not comply with that portion of the requisition contained in the 13th section, which relates to the quality of the land proposed to be taken, and the improvements thereon.

## ROGERS v. WALKER.

A. who had a son by a former marriage, married B., by whom also he had a child; both A. and B. died. C., the brother of B., obtained administration on both successions; the child of B. dying, the tutor of the child, by the former marriage, sought to annul the letters of administration of C., and obtain them for himself. *Held*: B. left a child, the issue of her marriage with A.; the subsequent death of that child, cannot render the administration of C. illegal

**A**PPEAL from the Fifth District Court of New Orleans. *Benjamin and Micou*, for plaintiff. *T. A. Bartlette*, for defendant. By the court:

Rost, J. The reasons given by the district judge, to set aside the appointment of *James Walsh*, as administrator of *Charles O'Keefe* and of his second wife, *Ellen Walsh*, are not satisfactory to us.

*Rogers*, as tutor of a son of *O'Keefe* by a former marriage, had no claim whatever to the administration of the succession of *Ellen Walsh*, at the time of the appointment, she having left a child, the issue of her marriage with *O'Keefe*; the subsequent death of that child, cannot render the administration of *Walsh* illegal.

From the very circumstance that *Walsh* applied for the administration, the court must have presumed that there were heirs present; they are presumed to have had notice of the application, and if they did not see fit or were not at the time in a situation to oppose it, the appointment made, according to the forms of law, should be sustained. If the minor has been injured by the acts of the administrator, he has his recourse against him, and his surety on their bond; but we see no ground for disturbing the sale of the house and lot made to *Mrs. Walker*.

It is ordered, that the judgment in these consolidated cases be reversed. It is further ordered, that in the case of *David J. Rogers, tutor, v. Mrs. C. L. C. Walker et al.*, there be judgment in favor of the defendants, with costs in both courts.

It is further ordered, that in the case of the succession of *Charles O'Keefe* and wife, the account of administration, filed by *James Walsh*, be reinstated, and the case remanded for further proceedings on said account, according to law. The costs of the appeal to be paid by the succession.

## WILLIAM WARD v. JOHN VALENTINE, Curator.

In an action, brought many years after its alleged maturity, to recover the contents of a destroyed promissory note, and the only evidence of the original contract is the testimony of the plaintiff's brother that the maker acknowledged it; and it also appears that the maker lived two years after the alleged acknowledgment, and was solvent, yet, that no steps had been taken to recover it during his lifetime. Upon such testimony, it was held that the plaintiff could not recover without strong corroborating circumstances.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. John Finney*, for plaintiff. *A. A. Frayser*, for defendant. By the court:°

°*Eustis, C. J.*, did not sit in this case.

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ROST, J. The plaintiff claims from the curator of *Hiram Goodrich*, deceased, \$500, it being the amount of a negotiable note of *Goodrich*, alleged to have been destroyed by fire, together with interest at the rate of six per cent per annum since the maturity of the note on the 9th day of August, 1840, according to the laws of Pennsylvania, where the note is said to have been given.

This action was commenced in 1849, and the defendant has pleaded the general issue and the prescription of five years; there was judgment in his favor, and the plaintiff appealed.

The only evidence of the original contract is contained in the acknowledgment of the defendant, relied upon to get rid of the plea of prescription, and that acknowledgment is attempted to be proved by the naked testimony of the plaintiff's own brother. Under the peculiar aspect of the case, his evidence was not satisfactory to the district judge to prove even the original obligation, and we cannot say that he erred.

Near relationship of witnesses to the parties to the suit, goes to their credibility, and the present record discloses a circumstance which makes it necessary to give effect to that rule. *Goodrich* lived two years after the alleged acknowledgment and promise to pay were made, and is shown to have been solvent; yet no steps were taken by the plaintiff to coerce payment in his lifetime. The evidence of his declarations, given after his death, by one whom the law presumes a partial witness, is not of such a character as a court of justice can act upon, unless it is attended with strong corroborating circumstances, which are totally wanting in this case.

The plaintiff relies, also, upon the testimony of *Postley*, in whose hands a note, purporting to be signed by *Hiram Goodrich*, had been placed for collection by the plaintiff, in the State of Pennsylvania; but as that witness states that he did not know the signature of *Goodrich*, and could not say that the original note, or the statement at the foot of the copy, made of it after it was destroyed by fire, while in his possession, were in the hand-writing of *Goodrich* or signed by him, his testimony, taken by itself, proves nothing, and is insufficient to verify the declarations of the other witness.

The judgment is affirmed, with costs.

## STATE OF LOUISIANA v. THE DISTRICT JUDGE OF THE PARISH OF JEFFERSON.

The Supreme Court will not grant a *mandamus*, where it does not appear that the subject matter, with respect to the amount involved, falls within its jurisdiction.

THIS was an application for a *mandamus*, to compel the district judge of the Third Judicial District, to grant an order for the sale of perishable goods, which had been attached. The petition for the *mandamus* did not state the value of the goods.

By the court:

SLIDELL, J. It does not appear that the subject matter with respect to the amount involved, falls within the jurisdiction of this court. See *Pligue v. Bellome*, 2d Ann. 293. It is unnecessary, therefore, to say, whether the decision of the district judge presents a case for relief by *mandamus*.

Let the application be dismissed, at the costs of the appellant.

## THE UNITED STATES v. JOHN KELTY SMITH and JOHN CHANDLER SMITH.

Where the debtor is present and subject to the jurisdiction of the court, his creditor can not, simultaneously with an action for the recovery of his debt, have a general sequestration of his property, nor restrain him by injunction in the exercise of the rights of ownership.

As a general rule, the government of the United States, in its proceedings in its own courts, and in the courts of the State to which, in civil actions, it may resort, can only act through its offices and officers established by law.

Where the district court dissolved an injunction because it was obtained by one not competent to represent the plaintiff, the subsequent appearance of one duly authorized, and his prosecution of the case to the appellate court, can have no retroactive effect.

**A** PPEAL from the First District Court of New Orleans, *Larue, J. L. Hunton*, District Attorney of the United States, *Miles Taylor* and *Thomas J. Semmes*, for plaintiff.

*Mr. Semmes* contended: That the Solicitor of the Treasury, by direction of the Secretary of the Treasury, empowered *Mr. Mechlin*, as special agent of the government, to institute this suit, and that the act of the Secretary of the Treasury is, in point of law, the act of the President of the United States. 1 Peters 296. 12 Peters 524. 1 R. R. 427. The question then presented for solution is, has the President of the United States the lawful power to appoint an agent, other than the regularly commissioned United States Attorney, to institute a suit and represent the government *pro hoc vici*.

The United States is a body politic as well as a sovereign. The capacity to contract and enforce the performance of contracts, is incident to the government as a body politic, and not as a sovereign. *Cotton v. United States*, 11 How, 230. 10 Peters 343. 5 Peters 115. As a body politic it must, of necessity, act through the instrumentality of agents. The act of contracting or of suing not being the exercise of a sovereign power, the power to sue or contract exists independently of the Constitution of the United States, except in so far as the adoption of the Constitution was necessary to bring into existence a corporate entity. Hence the power to sue or contract, is not expressly granted to the government by the Constitution. It is evident, therefore, that the government could contract and sue anterior to, and independently of legislation on the subject, and *ex necessitate* appoint agents for the purpose. The Constitution declares that the President "shall take care that the laws be faithfully executed." This clause, it is submitted, vests the power in the Executive to appoint agents for the purpose of enforcing the laws. This power, therefore, is vested in the President independently of legislation, and legislation cannot divest him of it. The propriety of the exercise of the power is one thing; the existence of the power is another. Now let us suppose Congress had passed no law creating the office of United States Attorney, would not the President have been authorized, nay obliged, to have made contracts with various attorneys, in various sections of the country, to prosecute the claims of the government? In the supposed state of things, the government would be under the necessity of making a contract with some attorney for each particular case. To remedy this inconvenience, Congress passed the Act of 1789, creating the office of district attorney, and making it the duty of the district attorney to prosecute suits of the government. Before this act was passed, it was a mere voluntary matter, a matter of agreement between the government and any attorney who might be selected, whether the attorney thus selected would or would not undertake a suit for the government. The object of the act was to provide an officer, upon whom the President could at all times call, who would be bound to obey, and whose compensation would be fixed; thus saving the trouble, delay and expense of making numerous contracts for the conduct of each particular suit. While such an

UNITED STATES officer exists, and is paid to institute suits, the President would rarely exercise the constitutional power he possesses, because there would be rarely an occasion for it, and, if unnecessarily exercised, Congress would refuse to appropriate money to pay the expense; and hence the money power is the check upon the President so as to prevent abuses. That this is the true view of the subject, is illustrated by supposing that the Act of 1789, creating the office of district attorney, were repealed, would the government be defenceless? Again, suppose the present district attorney for Louisiana were dead, or ill, or temporarily absent, and instant action were necessary to enforce a right or protect the property of the government, would the President be obliged to wait until a new commission could be sent out from Washington? The Act of '89 is not exclusive in its terms, and was not designed to be so. If the Act of '89 were prohibitory, the Attorney General of the United States could not appear for the government in the Circuit Court, because the same section makes it his duty merely to appear in the Supreme Court at Washington.

Again, though the President might not have the power to appoint an attorney at law, it is no part of the duty of the United States Attorney to make affidavits, and the President could appoint an agent for that purpose. If so, the mere filing of the petition, with the affidavit of the agent, would be sufficient to maintain the injunction.

Again, by virtue of the Act of 1820, Statutes at large, vol. 3, p. 592, creating the office of agent of the treasury, and of the Act of 1830, vol. 4, p. 414, transferring the duties of the agent of the treasury to the solicitor, the Solicitor of the Treasury has the power to direct and superintend all suits in the name and for the use of the United States. This suit being then directed by him, is authorized by law. If the solicitor has the power to direct a suit, if necessary, he may employ persons to institute it. The propriety of the exercise of the power by him, or the President, cannot be judicially inquired into. Hence there is no strength in the objection, that oppression would result from the employment of irresponsible agents. The oppression, if any, results from the suit, not the employment of an agent to prosecute it, and the suit here is ordered by the officer appointed by law to direct its institution. The district attorney would be bound to obey the solicitor. See Act of 1830. So that the act of oppression, the suit, would be the same whether the instrument were the district attorney or an agent.

2d. No security is necessary for the purpose of obtaining an injunction when the government is a party. *Williams v. Chew*, 6 N. S. 465. The object of security is to prevent oppression; the government is always presumed to act with justice and clemency. 3d. The facts stated in the petition authorize an injunction. C. P. art. 303. 8 L. R. 104. Art. 3150 C. C. Art. 1964 C. C. Art. 1965 C. C. 9 Wheaton 738. 5 N. S. 501. 8 N. S. 686. 4th Ann. 175. 12 R. R. 25, and particularly 16 L. R. 106. 4th. The judge below ought not to have condemned the United States to pay costs. The United States never pay costs. 6 N. S. 465. There ought not to be a judgment against the sovereign, because it cannot be enforced except by his permission. The injunction, if wrongfully issued, ought merely to have been dissolved.

*Roselius, Josephs and Grymes*, for defendants: The article 298 of the Code of Practice enumerates all the cases in which injunctions may issue against the defendants in a cause. From No. 1 to 8 of that article, all the cases in which injunctions may issue against the defendant are clearly stated.

The first seven numbers have no direct application to this case, but they show the general spirit and intention of the law to confine the remedy within reasonable and just bounds. It allows it to restrain the personal acts of the defendant in relation to property and rights easily located or described, in which a *prima facie* case can be made out with clearness and precision, and when the circumstances of the case will show, at least, a proximate standard by which the judge can estimate the probable damage to the defendant by granting the writ, and enable him to take security accordingly.

No. 8 of this article is the only one directly applicable. It declares that when the ownership of an estate real or personal is in dispute, &c.

Ownership, as used in this article, means title or right in the estate, real or personal. The French text of the code is equally clear: "lorsqu'il a contestation sur la propriété d'une chose mobilière au immobilière," when there is a contestation as to the property in or title to a thing. The true meaning and spirit of



this number is as obvious as that of the others. It confines the writ to cases where the title is in dispute, where some right growing out of an estate or thing is claimed, a chose or thing which may be described, and which may be distinguished from other things, and cannot by possibility be extended to all the money, all the promissory notes and bills, and all the stocks that a defendant may have in his possession, either in his own right or belonging to others, without specification, description, enumeration or amount.

Injunctions against third persons not parties to the suit, are regulated by the articles 300, 301 and 302 of the Code. The first two of these articles provide for specific cases that can have no relation to this matter. The article 302 provides for cases of deposit or mere possession where a third person claims the ownership of the property by a suit; such third person may obtain an injunction, &c.

This article is in perfect harmony with No. 8 of article 296, and is clearly only applicable to cases where title, or possession, or some right growing out of title is in dispute.

But, it is said, that if this case be not within any of the provisions of the articles of the Code before cited, that it is within the discretion of the court, under the general provisions of the article 303 of the Code. We think it is clearly not so. This article is in the same spirit, lays down the same broad line of limitation, and is in perfect harmony with all the other articles quoted. It uses the same language: it says that, "besides the cases above enumerated, injunctions may issue when it is necessary to preserve the property in dispute during the pendency of the action; and as clearly limits the discretion of the court to cases where property, or the title to property, is in dispute, as any of the preceding articles, property that may be described, its value ascertained, and its nature defined; and that no warrant can be found in that article for an injunction where no title, no right of possession, and no right or interest in the property itself is set up by the plaintiff, and no description by count, weight, measurement, or amount is or can be stated: but a general writ, embracing all the fortune, money or property of a defendant issued upon such showing as is made in the plaintiff's petition. We, therefore, conclude that the injunction in this case is not warranted by a just interpretation of the law of Louisiana.

In the great case of *Livingston and the Steamboat Company*, which involved the statutory privilege granted to *Livingston* and *Fulton* of the exclusive navigation of the waters of New York by steam, the complainant asked an injunction to protect his vested right, under the statute of New York.

The law was laid down in the able and learned opinion of Chief Justice *Savage* to be, that injunctions are always granted to secure the enjoyment of statute privileges of which the party was in the actual possession, unless the right be doubtful; and the injunction was refused, because the constitutionality of the law was doubtful. *Steamboat Company v. Livingston*, 3 Cowen, 755.

In the case of *Hart v. The Mayor, &c.*, of Albany, the same doctrine is laid down by Chancellor Walworth. 3 Paige, 214.

In the case of *Wiggins et al. v. Armstrong et al.*, Chancellor Kent dissolved an injunction, because the plaintiff was not a judgment creditor. 2 John. Ch'y. Rep. 145.

The following cases are also in point: *Corporation of New York v. Mapes*, 6 John. Ch'y Rep. 49. *Ogden et al. v. Kip*, 6 John. Ch'y Rep. 160. *Reid v. Gifford*, *Id.* 19. *Laasing v. North River Steamboat Company*, 7th John. Ch'y Rep. 164. *Storm v. Mann*, 4th John. Ch'y Rep. 21. *Amelung et al. v. Seecamp*, 9th Gill & John. 474. *Union Bank v. Poultney et al.*, 8th Gill & John. 332. *Maryland Savings Institution v. Schroeder*, *Id.* 106.

The plaintiffs do not set up any right or title to the property. They do not pretend to be in any way creditors of *John Chandler Smith*. They acknowledge and charge that he is in possession and claims as his own, the large mass of property on which the injunction is to operate. The sole ground shown for the writ is, the fraud charged, that he is covering the property of the other defendant.

Fraud is never presumed, it must be proved. No fact is set forth or shown from which the truth of the charge can be inferred, or even rendered probable, until proved. It is, to say the least of it, uncertain; and while uncertain, a court of equity will not grant an injunction.

The United States are a great political corporation, invisible, and acting only through such agents as are designated by the Constitution or by acts of Congress made in pursuance of the Constitution. Under the description in the petition,

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UNITED STATES the United States can be informed of nothing and can have no belief. Therefore the affidavit verifies nothing.

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No indictment could be maintained on it, because, in such a prosecution, the proofs necessary to maintain it must come from the side of the prosecutor, the crime must be clearly proved; and how could the fact, that some officer of the government was informed and did believe in the existence of some of the facts set forth in the petition, be negatived by the prosecution.

We therefore conclude that the affidavit is totally insufficient to sustain the writ.

The defendants submit another point for the decision of the court.

They take it for granted that every defendant has a right, when sued by an agent, to call for the authority of that agent, and that he is bound to show a lawful and competent authority, or have his proceedings dismissed. *Shewell v. Stone*, 12 M. R. 388.

The laws of the United States have provided by whom and in what manner suits in their name shall be instituted and prosecuted. See Act of 1789, sec. 35, 1st Statutes at large, 92.

This suit was instituted and prosecuted by persons holding no office under the government, and having no apparent right to act on behalf of the government, or to use its name. This want of authority was assigned as one cause for the dissolution of the injunction. The agent or sub-agent who makes the affidavit, and who also signs the petition as counsel, then produced a letter from the Solicitor of the Treasury to one *Mechlin*, of the city of Washington, appointing him special agent to collect the debt sued for from one of the defendants, *John K. Smith*, and a sub-delegation from *Mechlin* to the gentleman who brings the suit; both letters are in the record and will speak for themselves.

We respectfully contend that this is no sufficient authority to sue in the name or on behalf of the Government.

That no judgment pronounced in this suit would be *res judicata*, or protect the defendants against the further pursuit of the plaintiffs through a legitimate and lawful channel. The Solicitor of the Treasury has, by law, no power to make such an appointment. The act of Congress creating the office does not give any such power, and any such appointment is void. See Act of 1830, 4th Statutes at large, 414.

It is true that the district attorney has since appeared in the cause. But it was long after the judgment dissolving the injunction, and, we submit, that the correctness of that judgment should be tested by the state of things which existed at the time it was rendered.

By the court:

EUSTIS, C. J. This appeal was taken by the district attorney of the United States in behalf of the plaintiffs, from a decree of the Court of the First District of New Orleans, dissolving an injunction which had been issued at their instance. The reason given by the district judge for dissolving the injunction was, that *Mr. Semmes*, who made the affidavit on which the injunction was granted, as agent of the Government of the United States, and by whose agency the suit in which the injunction issued was instituted, had no right to appear to make the affidavit as agent for the Government of the United States, and that all his acts done in that character were null and void.

The district attorney of the United States has appeared in this court, and, aided by counsel, has asked the reversal of this decree and the maintenance of the injunction. The argument at law has not been confined to the point decided by the district judge, as to the want of authority on the part of *Mr. Semmes*, but has been extended to the subjects presented by the record.

It appears that on the second Monday of April 1822, *John Keltz Smith* appeared in the Circuit Court of the District of Columbia, and confessed judgment in favor of the United States for the sum of five hundred thousand dollars and costs. On the entry of the judgment, on the fourth of May following, it was provided that the same should be released, on the payment of the sum of \$280,560 61, with interest from the 21st of September, 1821, and costs of suit.

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The petition charges the indebtedness under this judgment, and that a suit was instituted, simultaneously with the present suit, against said *John Kelty Smith*, for the recovery of the amount. The petition alleges, that the amount of the judgment was the balance due the United States on account of monies deposited with the said *John Kelty Smith*, as navy agent of the United States at New Orleans, and not accounted for by him; that, since the date of the judgment, the said *Smith* has done no business and held no property in his own name, but that his business has been done and his property held in the name of others; that, for the last fifteen years, the said *Smith* has been, and continues to be, engaged in the business of banking and brokerage, in the city of New Orleans. The substance of the charges of the petition, divested of all unnecessary prolixity is, that this business is done under cover of the name of the son of said *Smith*, *John Chandler Smith*, who does not reside in New Orleans, but in the city of Baltimore, in whose name all the property stands, and the business is exclusively conducted; that *John Kelty Smith* transacts, himself, all the business, in the name of the son, under a power of attorney from him, which is a mere fraud for the purpose of concealing the real party in interest; that a large capital, really belonging to *John Kelty Smith*, is thus secretly employed for the purpose of screening the same from his creditors, the plaintiffs; that this capital consists of money deposited in banks, bills, notes, stocks, and is kept in a form immediately convertible, and that the said *John Kelty Smith* has no other property, and that this is quite sufficient to pay the plaintiffs' debt; that *John Chandler Smith*, by being a party to these frauds and simulations, with the design and intent to defraud the plaintiffs, has become personally liable to them, in the amount of the effects thus standing in his name.

The plaintiffs then represent, that there is just reason to believe that the parties defendant will dispose of the effects thus held, for the purpose of defrauding the plaintiffs, and they ask for process of sequestration and injunction, for the purpose of preventing any disposal of them during the pendency of this suit. The petition concludes with a prayer for judgment, according to its allegations, and for general relief. Injunctions were issued, prohibiting the officers of the several corporate banks of this city in which the parties did business, from disposing of, or transferring, during the pendency of this suit, any of their capital stock, or any money, bills, notes or securities, deposited with them in the name of *John Chandler Smith*. The process granted on the petition of the plaintiffs, amounted, in fact, to a general sequestration of the whole capital and effects employed by *John Chandler Smith*, in his business as a banker and broker in the city of New Orleans.

The petition is signed by *Mr. Semmes* and another gentleman of the bar, as attorneys for the plaintiffs; the affidavit annexed to the petition, is made by *Mr. Semmes*, who attests that he is the duly appointed agent and attorney of the United States of America in this behalf.

The question was put to the counsel who argued this case for the plaintiffs, whether, conceding every thing which is alleged in the petition to be true, and the affidavit to be direct and sufficient as attesting its allegations, (which is far from being our impression) a proper case is made out for the issuing of the writs of injunction as prayed for. No precedent, no authority has been adduced in support of these proceedings, nor has even an attempt been made at the bar, within the knowledge or recollection of any of us, to institute them; nor is there any statute under which they are even indirectly sustained. Proceedings against an absconding debtor, for a general sequestration of his effects, at the

UNITED STATES instance and under the affidavit of three of his creditors, are authorized by statute. We have, also, a remedy against the property of absentees under a foreign attachment process. But where the debtor is present and subject to the process of the court, there is no warrant in the law, that we ever heard of, for taking from his possession and control his property in *limine litis*, at the instance of a plaintiff who sues him for the recovery of a debt, and for the purpose of subjecting the property to the satisfaction of the judgment which the creditor seeks to obtain. Supposing, therefore, that this property belongs, in fact, to *John Kelty Smith*, and is in his possession, where is the power given to the creditor, under any process of the court, to disturb him in his peaceable possession of it, and to arrest, at once, without notice and without a hearing, the business by which his livelihood is obtained? The plaintiffs, had they a judgment, might have the remedy of judgment creditors against the property of their debtor; but they have no judgment, in a legal sense, against *John Kelty Smith*, and they have, accordingly, instituted their suit to obtain one. The judgment they sue upon is a judgment rendered by a court, under the system of the common law, in the District of Columbia. Under that system, after the lapse of a year and a day, if no execution be taken out, the courts conclude *prima facie* that the judgment is satisfied and extinct, and no execution can afterwards issue on it, unless the judgment be revived by process of *scire facias* under the statute; or the plaintiff may have his action of debt on the dormant judgment, which was the only mode of revival known to the common law. 3d Blackstone's Com. 422. Indeed, this question, by being stated, answers itself. What would be thought of a plaintiff who should begin his suit on a promissory note against his debtor, by a general sequestration of the debtor's property? Such a proceeding is repugnant to all our ideas of the rights and remedies of litigants under our laws.

Another point made by the defence, which has been very fully argued at bar, and upon which the district judge decided is, whether there was any sufficient authority to institute and prosecute this suit in the name and in the behalf of the United States.

Had the suit continued to be prosecuted under the original authority only by which it was commenced, and had the court come to the conclusion that the authority was not sufficient, the suit might have been dismissed without comment for want of a party plaintiff, and the United States could not be considered as having been in court. But the district attorney of the United States has taken this appeal in the name of the United States. The United States is before the court, therefore, as the party appellant.

It appears that the suit was instituted by *Mr. Semmes*, as the agent of the government, under the authority contained in a letter from *Mr. A. H. Mechlin*, of Washington City. *Mr. Mechlin* derives his authority from the Solicitor of the Treasury who states, in his letter to *Mr. Mechlin*, that he, *Mechlin*, having proposed to collect the judgment against *Smith*, and the proposition having been referred to the Secretary of the Treasury, that officer directed the solicitor to employ him as special agent, to collect the judgment, on the terms mentioned in a letter from the solicitor to the secretary; he, therefore, in the furtherance of this object, authorizes *Mechlin* to appoint, on behalf of the United States, an agent to collect the judgment, and to institute all proceedings necessary thereto, in the name of the United States, &c. Thus the solicitor appoints *Mechlin* to collect this debt, with authority to appoint a sub-agent, and *Mechlin* appoints *Semmes*.

The present suit was instituted in the Court of the First District of New Orleans, on the 11th of December, 1851. A motion was made to dissolve the injunction on the 15th, and was decided on the 23d of that month in favor of the defendants. An application was made for a new trial, which was argued on the 17th of January following. The application failed, and the judgment dissolving the injunction was signed on that day. Up to the date of the 17th of January, the proceedings were conducted solely under the authority of *Mr. Semmes*, and without the intervention of the district attorney. On that day he entered an appearance and is of record one of the counsel on the argument for a new trial; and on his motion the appeal was taken to this court.

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The district judge thought the authority of *Mr. Semmes* insufficient to enable him to institute the proceedings in behalf of the United States. This is not the first time that the officers of the government of the United States have brought the United States into the courts of this State, for the purpose of making use of legal process in the collection of debts due the United States. *The United States v. Bank United States*. 11 R. R. 418. They claim the right to the most stringent process against property, without giving the security which the law exacts from ordinary litigants. It would seem to be but just that, in cases of this kind, the interests of the United States should be entrusted to a responsible public officer; and we think we are doing no more than our duty in commenting on the proceedings before us, as they are attempted to be sustained by the law officer of the United States.

Our impression is that, as a general rule, the Government of the United States, in its proceedings in its own courts and of the courts of the State to which in civil actions it may resort, can only act through its offices and officers established by law. The delegation of power to institute suits, by an executive officer, to an individual having no official character or responsibility; the sub-delegation of the same power, without any warrant of law for either, seems to be in conflict with the theory of our institutions, as we have understood them. We have not found any authority in the laws of the United States for the appointment of a private person to institute suits in the name of the United States, to bring them into State courts at his discretion, and thereby subject their great interests to ultimate adjudication. 1 Statutes at large 92 § 35. 3d *Ib.* 592. 4th *Ib.* 414. In each district of the United States there is a district attorney, whose duty, as established by law, is to prosecute all civil actions in which the United States shall be concerned. The Solicitor of the Treasury is to direct and superintend the suits of the United States. Instead of the action of the government through its constituted organs, instead of the direction of the solicitor to the district attorney, we have his appointment of a private individual, who again appoints a substitute, to do that which the law assigns as a duty to its responsible officers, under the sanction of their oath.

But the district attorney appeared, in this case, under instructions from the Treasury Department. We do not think his appearance has, as to the matters before us, any retroactive effect. After his appearance the United States may be bound by his acts, but we cannot consider it as giving any validity to the judicial proceedings upon which a decree had passed previous to his appearance.

His appearance, and avouching in the name of the United States what has been done in this suit, imposes on us the necessity of noticing the subject, lest it should be supposed there is a recognition, on the part of this court, of the doctrine maintained at bar in behalf of the government. We do not assent to it. We decide nothing on this point, because there is no necessity for it, and we do not

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We live under established institutions, and under a government of laws. We consider the law officers of the United States as magistrates, standing, in the performance of their duties, between the government and the citizen. It is as much their duty to respect and save the rights of the citizen, in their official functions, as it is to collect the dues of the government. The law recognizes no other action on the part of its ministers, and the citizen has a right to appeal to, and have the benefit of their judgment and of their conscience, in all cases in which the power of the government is brought to bear upon him.

There may be cases not foreseen or provided for by law, and we do not undertake to assert the contrary, in which the President of the United States, under his constitutional power to take care that the laws of the United States be faithfully executed, may direct the institution of suits, by appointing persons for that purpose other than the public functionaries, but the present case presents no single feature of emergency or necessity, nor is it in that respect distinguishable from an ordinary suit against a debtor inhabiting the same city with the responsible law officer of the government.

It is considered by the court, that a creditor, before judgment, is without right to obtain an injunction on the case and for the purposes stated in the petition; and that, therefore, the judgment of the district court, dissolving the injunctions, be affirmed.



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### UNION TOWBOAT COMPANY v. LOUIS BORDELON, Auditor, &c.

The act of the Legislature of the 3d of March, 1847, investing the tax collector with the authority to seize and sell the property of a defaulting tax debtor, to satisfy his tax, is not in violation of that article of the Constitution of the United States, which provides, that no person shall be deprived of life, liberty or property, without due process of law; for the act itself points out, precisely, that very process of law by which the defaulting tax debtor may be deprived of his property.

Nor does that act, from the fact that the tax collector is empowered to seize and sell the property of a defaulting tax debtor to pay his tax, without the aid or intervention of the judiciary, violate the Constitution of the State. For, by the Court: it is true, as contended, that the functions of our departments of government are kept distinct, and the executive cannot divest judicial process. But the assessment of taxable property and the collection of taxes, are legal proceedings or process, but not judicial proceedings or process. If these proceedings take place illegally, as supposed in the present case, then the functions of the judiciary may be invoked, but not otherwise.

The tax levied on a steam towboat belonging to a company, the object of which is "towing vessels by steam in and out to sea and up and down the river Mississippi, and carrying freight and passengers in like manner; also wrecking or lightening vessels in said river or sea, and carrying freight and passengers in the Gulf of Mexico, and elsewhere at sea," is not in contravention of Article 1st, section 8, of the Constitution of the United States, which gives Congress power to regulate commerce with foreign nations, and among the several States.

The exigencies of government require that the process for the collection of taxes, should be summary. They are to be regarded not as a debt, to be enforced against the debtor who contracted it, by judicial proceedings, but a contribution required from the citizen for the support of government, and for the protection and benefit of all.

**A**PPPEAL from the Second District Court of New Orleans, *Lea, J. Hunton and Bradford, and Benjamin and Micou*, for the plaintiff: The 1st and 2d articles of the Constitution of the State of Louisiana, provide that "the powers of the government shall be divided into three distinct departments, and each of them be confided to a separate body of magistracy;" "and that no one of these departments, nor any person holding office in one of them, shall exercise powers properly belonging to either of the others, except in instances expressly directed or permitted.

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The only articles of the Constitution, which refer to the levying of taxes, are the 32d article, which declares, that "all bills for raising revenue, shall originate in the House of Representatives, &c.;" and the 127th article, which provides, that "taxation shall be equal and uniform throughout the State, &c."

It thus appears, that the separation of the different departments of the government, by our Constitution, is express and positive; and is accompanied by an inhibition, upon each department, for the exercise of any powers, properly belonging to the others; and that, while the power to levy taxes is recognized as appertaining to the legislative department, the Legislature is left to provide for their collection, under the restrictions which result from the division of the powers of the government among the different departments.

It thus becomes an important question, to demand to which department of the government it properly belongs, to authorize and enforce the compulsory collection of taxes.

It is certainly competent for the Legislature to provide for the mode in which taxes shall be assessed. When the assessment has thus been made, it may be considered as sufficient *primd facie* evidence, at least, of a debt to the State, from the citizen on whom the tax is imposed. But if the citizen neglects or refuses to discharge this debt, how is the payment of it to be enforced? In what respect does a debt to the State differ from a debt to an individual, as regards the process for its collection? It is said, by the judge of the court below, that "there is nothing in the Constitution which prescribes the particular process of law, by which persons may be divested of their property;" but certainly it must be by some "process of law," in virtue of a competent authority. If a collector of taxes can be authorized to proceed, by a summary seizure, for the recovery of a debt to the State, it is not easy to see why an individual may not be authorized to proceed in the same way. It belongs essentially to the judicial power of the government, to grant the proper remedy and aid to the State, as well to individuals, for the enforcement of the legal claims; and any statute which authorizes a mere ministerial officer, to proceed directly to the seizure of the property of the citizen, is believed to be an infringement of the powers of the judiciary.

If it be conceded, that the Legislature has the unquestionable power to prescribe in what mode taxes shall be assessed, and to erect the taxes so assessed into a privileged claim upon the property charged with them, yet it would seem to be the peculiar province of the judiciary, to authorize and direct the sale of the property for their payment. To grant such authority, is essentially an act of a judicial character. It was so held under a Constitution, having similar provisions with our own, in a case in 10 Yerger's Reports, 59. The power, then, to grant such authority, must vest in the judiciary, and can be vested nowhere else. It must be exercised by the judiciary, and cannot be exercised by any other class of magistracy. Any act of the Legislature, therefore, which assumes to grant such authority directly to a collector of taxes, is clearly in contravention of the 1st and 2d articles of the Constitution of this State.

It may be further observed, that the section 5th of the revenue act of 1847, imposes a fine, in certain cases, on any person or corporation who shall be indebted to the State for any tax, license or commission, and who shall have refused or neglected to pay the same, after final judgment has been rendered therefor. It seems, then, that in the case of a tax upon any trade or profession, the amount of the tax is considered as a debt, and that it can only be recovered after final judgment. But in what does a tax on a trade or profession differ from a tax on property, as to the nature of the liability they created, or as to the proper and constitutional method of enforcing its discharge? If a final judgment is necessary in the one case, why is it not equally necessary in the other?

It will be found, that the modes of enforcing the collection of taxes in the different States, vary as widely as the Constitutions of those States, and it is

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impossible to reason from the method pursued in one State, to the method pursued in another, unless the Constitutions and laws of those States are first ascertained to be similar. There is nothing in the Constitution of the United States, to restrain the Legislatures of the several States from the exercise of judicial powers; and where no such restrictions are found in the Constitution of the particular State, the Legislature itself may well exercise such powers or it may delegate them to such magistrates as it may deem proper. It is only in the States that have specially provided for a careful distribution of powers among the different branches of the government, that the question can arise.

The only remaining question in this case, arises upon the proper construction of the 1st article of the 8th section of the Constitution of the United States.

By that article, Congress is invested with the power "to regulate commerce with foreign nations, and among the several States." It is well settled, that the power to regulate commerce, includes the power to regulate navigation and intercourse; and that this power is exclusive. Under this power, Congress has passed laws for the enrollment and licensing of vessels, when so enrolled and licensed, all vessels are entitled to engage in the commerce among the several States, without restraints or impediments from State legislation. But if the several States have the power to levy taxes on vessels so engaged, they may easily defeat the rights acquired under the sanction of Congress. All right of taxation, is in its nature unlimited, and an unlimited right to tax, is a power to destroy. 4 Wheaton, 484. 9 Wheaton, 562. 12 Wheaton, 419. 7 Howard, 283.

It is believed that these decisions, and the cases referred to in these decisions, go far to sustain this position, if not decisive of it. But it is proper to refer the court to a decision, upon this subject, in 3 Hill 14, *Howell v. State of Maryland*.

*Isaac Johnson*, Attorney General, for the State.

By the court:

PRESTON, J. The State claims from the Union Towboat Company, a tax amounting to \$392 66, on the capital stock of the company, and in default of payment, the tax collector of the district in which the capital of the company was assessed, seized, and was about to sell, one of the boats of the company to satisfy the demand of the State.

He has been enjoined on several grounds, two of which, alone, have been relied upon in this court, and have been discussed by the counsel of the plaintiffs, and the attorney general.

It is contended, that the seizure of the property of the company, is in itself illegal, because it was not authorized by any judicial proceedings, and any act of the Legislature, authorizing the collector of taxes to make such seizure, without the aid or intervention of the judiciary of the State, is unconstitutional.

The 49th section of the act, approved the 3d of March, 1847, "to provide a revenue for the State," under which the tax was laid and about to be collected, expressly authorized the collector, if the tax was not paid by the tax payer, to seize and sell his property to satisfy the tax.

It is argued, that this legislation violates the 5th article of the amendments to the Constitution of the United States, which provides, that no person shall be deprived of life, liberty or property, without due process of law. It may be a question, whether the article is not limited in its application to criminal proceedings.

But conceding that it prevents the divestiture of private property in all cases, without due process of law, the section of the act of 1847 quoted, points out, precisely, the process of law by which a defaulting tax payer may be deprived of his property in satisfaction of the taxes due by him. The exigencies of government require, that the process for the collection of taxes should be summary. The taxes are not, as supposed in argument, a debt to be enforced against the debtor who contracted it, by judicial proceedings, but a contribution required



from the citizen by the government, established for the protection of all, for its support, and without which contribution it could not be supported. Its speedy collection too, is generally indispensable to the success of the government and prosperity of the people; and it is often laid in such small sums, that judicial proceedings to collect it would be absurd.

The tax collectors have been authorized by law, from the foundation of the government, to collect taxes in this summary manner. They have always sold property in the summary manner prescribed by such legislation, to enforce the collection of taxes. Their authority and their sales, have always been recognized as constitutional and legal by our judiciary, and every other department of the government and the whole people, without imagining that the Constitution of the United States was violated. Under the acts of Congress for laying and collecting direct taxes, to which the provision in the Constitution would certainly apply, if it applies to State laws, the collectors were directed to proceed by distress and sale of the property of the defaulting tax payer, and their process has been recognized and sanctioned by the Supreme Court of the United States. The objection to the process has been, for the first time as far as we know, seriously urged in this case, and to it we reply, *communis error facit jus*.

It is true, as contended, that the functions of our departments of government are kept distinct, and the executive cannot divest judicial process. But the assessment of taxable property, and the collection of taxes, are legal proceedings or process; but not judicial proceedings or process. If these proceedings take place illegally, as supposed in the present case, then the functions of the judiciary may be invoked, but not otherwise.

It is next contended, that the tax levied upon the property of the plaintiffs in injunction, is in contravention of Article 1, section 8, of the Constitution of the United States, which gives Congress power to regulate commerce with foreign nations and among the several States. The tax is levied on the capital of a company, the object of which is expressed in the first article of the association: "That the operations of the said company shall be, the towing vessels by steam in and out to sea, and up and down the river Mississippi, and carrying freight and passengers in like manner; also wrecking or lightening vessels in said river or at sea, and carrying freight and passengers in the Gulf of Mexico and elsewhere at sea."

It is said that the tax is a regulation of commerce, and conflicts with the power of Congress to regulate commerce with foreign nations and among the several States, which it is contended is exclusive.

We were inclined, when this case was submitted, to have expressed an opinion as to the respective rights and powers of the General and State Government, under this article of the Constitution, without reference to authority, the opinions of the courts of the United States being unsettled upon the cases arising under it; and if the tax had been laid upon a boat or vessel carrying on commerce with a sister State, it would have been a fit occasion.

But, upon examination, we find the tax laid not upon a boat carrying on commerce with a sister State, but upon the capital of a company organized under our general corporation act, in fact created by the State of Louisiana, and of course subject to the conditions which the State may impose.

The capital of the company is property, and the Constitution of the State requires an equal and uniform tax to be imposed upon it with the other property of the State, for the support of government. The capital of the company stands

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upon the same footing as the capital of insurance, or banking, or railroad, or other companies, or the capital of individuals.

We cannot conceive, then, that a question can arise under the article of the Constitution of the United States quoted. All taxation upon property within one State, may remotely affect its commerce with a sister State. Thus, a tax upon stores may increase the price of merchandise brought here by merchants from abroad; a tax upon warehouses, the price of the storage of produce from the western States; and a tax upon our markets may enhance the price or perhaps curtail the quantity of supplies brought to them. Yet these taxes have never been questioned. It is only when a regulation of commerce by a State directly affects commerce with a sister State, that a question can arise whether the grant to Congress to regulate commerce between the States is exclusive.

It was therefore decided by the Supreme Court of the United States in the case of the *State of Louisiana v. Nathan et al.*, that a tax upon a dealer in exchange, foreign as well as domestic, did not contravene the article of the Constitution invoked, 8 How. 73; and in *Magio's heirs v. Grima*, that a tax upon successions going to foreigners did not, *Ib.* 490; and in the case of the *Providence Bank v. Billings and Pittman*, that a State had power to tax a bank, there being no clause in the charter exempting it from taxation.

The language of Chief Justice Marshall, in that case, is conclusive of the present: "That the taxing power is of vital importance; that it is essential to the existence of government, are truths which it cannot be necessary to reaffirm. They are acknowledged and assented to by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a State may not relinquish it—that a consideration sufficiently valuable to induce a partial release of it, may not exist. But as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of a State to abandon it does not appear." 4 Peters, 561.

In fact, it was laid down in the *Federalist*, in expounding the contemplated Constitution, to induce its adoption: "that the States would possess an independent and uncontrollable authority to raise their own revenue for the supply of their own wants, and with the single exception of duties on imports and exports, would, under the plan of the Constitution, retain that authority in the most absolute and unqualified sense. And that an attempt on the part of the general government to abridge them in the exercise of it, would be a violent assumption of power unwarranted by any article or clause in the Constitution. This extract is from No. 32 of the *Federalist*, the production of Hamilton; but it may be seen by other numbers, the productions of Madison and Jay, that the principles were fully concurred in by them.

The question in this case is one as to taxation and subject to these principles. The question whether the power granted to Congress to regulate commerce between the States is an exclusive power, does not arise. And although the case has probably been presented to obtain the opinion of the court on this question, we do not think it proper to express a formal opinion on so important a subject when the case under consideration does not require it.

The judgment of the district court is affirmed, with costs.

## MOSES GREENWOOD v. LOWE and PATTISON.

A debtor of defendants furnished them with his name, in the form of a draft on their house.

The draft was accepted by defendants, and exchanged with *Partee & Co.*, for bills on their house in New York. *Partee & Co.* placed the acceptance of defendants in the hands of a broker to raise money on it. It was sold to *P. P. & Co.*, with the right reserved for *Partee & Co.* to take it back on certain terms, within a stipulated time. *Partee & Co.* did not redeem it within the time, and the broker who sold, now bought it of *P. P. & Co.* The broker exchanged the acceptance of defendants thus obtained, with the plaintiffs for other bills of larger amount, and paid the difference. Defendants contest the plaintiffs' ownership of the acceptance, on account of the manner in which it was disposed of by the broker and obtained by the plaintiff.

The court held: That the plaintiffs were holders for value, for according to the well settled doctrine of the commercial law, a merchant who gives his own negotiable paper for a purchase of negotiable paper, gives value, as well as he who gives gold or bank notes.

The law, from considerations of public policy, and in order to favor the free circulation of bills of exchange and other negotiable paper, looks with favor upon the holders of a bill who has given value for it, and requires very cogent evidence to convict him of *mala fides*.

Where, under the facts shown, the court may reasonably suppose a state of opinion, or belief in a party's mind, which is entirely consistent with honesty and fair dealing, and where there is another hypothesis involving dishonesty, it will be the duty of the court, unless the scale clearly preponderates in favor of the latter, to adopt that construction which is in favor of innocence.

Where the opinion of the court is founded upon its own knowledge of the course of trade, and not on proof of it in the record, the cause was remanded for a new trial by a jury of merchants.

**A** PPEAL from the Fourth District Court, *Strawbridge, J. Edwards* and *Olcott*, for the plaintiff. *A. N. Ogden*, for defendants. By the court:

SLIDELL, J. This suit is brought upon a bill of exchange, drawn in Alabama, December 26, 1850, upon the defendants, by *Alexander Pattison*, to the order of and endorsed in blank by *William H. Pattison*, for \$3523 75, payable at twelve months.

The defendants in their answer, denied that the plaintiffs were lawful holders; asserted that *Partee & Co.* are the legal owners of the draft, and that they have claims against *Partee & Co.* upon certain protested bills of exchange, drawn by them to an amount exceeding the amount of the bill sued upon.

There was a judgment in favor of the defendants in the court below, declaring the acceptance extinguished by compensation. The claims of the plaintiffs being rejected, upon the ground that they did not take the bill in the ordinary course of business. From that judgment, the plaintiffs have appealed.

It appears, that the defendants were merchants in New Orleans, and gave this bill, thus accepted by them, together with other bills by them accepted, before maturity, to *Partee & Co.*, of New Orleans, in consideration of several bills of exchanges drawn by *Partee & Co.*, on their own firm in New York, which latter bills came back protested, and the defendants having been obliged to take them up as endorsers, are now the holders thereof. *Partee & Co.* failed sometime in the fall of 1851.

It will be observed, that in this transaction *Lowe* and *Pattison*, the acceptors, were the persons who thus issued and negotiated their own acceptances. To a lawyer, applying to such a case, the technical doctrines which govern in the general the contracts of a bill of exchange, or perhaps to a foreign merchant,

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the transaction would seem anomalous. For as a general rule, when a bill gets into the hands of the acceptor, the contract is *functus officio*. But this seeming incongruity is explained by the common course of business in New Orleans, with which every merchant here is familiar, and to which it would be unreasonable for us to shut our eyes, since it has so frequently been illustrated by our records in commercial cases. That course of business is this: The planters, as a class, are in constant need of advances; the New Orleans factors, as a class, are in as constant need of discounts. Out of this state of things, has arisen the notorious practice of the factor receiving from the planter his bill on the factor, which the latter accepts, and gets discounted in the market, puts the proceeds to the planter's credit, and looks to the promised shipment of his crops to place the acceptor in funds to meet the bill. Acceptances to the amount of many hundreds of thousands of dollars, are thus, we have no doubt, thrown into the New Orleans bill market annually.

In September, 1851, *Partee & Co.* were much pressed for money, and in the hope of warding off impending failure, *Partee* gave his clerk, *Greenland*, orders to use all the paper the house had, in order to sustain its credit until *Partee's* return from the north. Accordingly, on the 20th September, *Greenland* put *Lowe* and *Pattison's* acceptance into the hands of one *Wartelle*, of the house of *Wartelle* and *Jackson*, money brokers, telling him he wanted to raise \$3000 on it, by selling it for that sum, with the privilege of getting it back at the end of seven days, if he desired, at an advance named. *Wartelle* on the same day, sold the draft to *Pickett, Perkins & Co.* for \$2980 cash, and with the privilege of getting it back in seven days, on paying \$3000. From the amount thus received, he deducted his commissions, \$10, and gave the balance \$2970 on the same day to *Greenland*. On the last day of the time stipulated, *Partee & Co.* were unable to raise the money to get back the bill; and *Greenland*, their clerk, came to *Wartelle*, and asked him to apply to *Pickett, Perkins & Co.* for an extension, which they refused, saying they would sell the draft for \$3000 to any one that wanted it. This *Wartelle* reported to *Greenland*, and late in the evening of the same day, *Wartelle* thinking, as he says, that *P. P. & Co.* would sell the bill to some one else, and that he could make something by buying it, bought it himself, for \$3000. This fact he concealed from *Greenland*, to whom, when the latter subsequently made inquiries about the bill, he replied that *Pickett, Perkins & Co.* had sold it. It is proper to observe, that *Greenland* disagrees with *Wartelle's* statement to this extent, that he denies having previously authorized *Wartelle* to make a sale of the bill; but he admits an authorization to raise money on it, and the receipt of \$3000 from *Wartelle*; and does not say, that when informed of the sale and its terms, he disapproved. Whatever was the truth upon this point, it is at least certain, that *Partee & Co.* had parted with their interest in the bill to the extent of \$2980, and that they would have no right to recover the bill from *Wartelle*, or any one holding under *Wartelle*, without reimbursing that amount.

Soon after this, *Partee & Co.* failed. *Wartelle*, on the 3d October, sold the bill to *Greenwood & Co.*, who are not proved to have had any knowledge of the antecedent circumstances. The facts relating to this purchase, are as follows: They had a few days previous employed *Wartelle* to sell two bills, accepted by themselves, and on the 3d October, *Wartelle* agreed to take these two bills amounting in principal to \$4263, and maturing in the following February and March, at a discount of one per cent a month, and to give *Greenwood & Co.* in payment *Lowe* and *Pattison's* acceptance, at two per cent a month, and pay

*Partee & Co.*, the difference, \$686 25 in cash. The transaction was so closed on that day. *Wartelle* afterwards negotiated the two acceptances of *Greenwood & Co.* *Partee & Co.* made a *cessio bonorum* in March 1851; and the defendants are still holders of their protested exchange, to an amount of say \$19,000.

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The right of the plaintiffs to recover, depends upon the answers to these questions. Are they holders for value? Are they holders *bona fide*, and in the ordinary course of business?

They are clearly holders for value. For according to the well settled doctrine of the commercial law, a merchant who gives his own negotiable paper for a purchase of negotiable paper, gives value as well as he who gives gold or bank notes. Are they holders, *bona fide*, and in the ordinary course of business?

This law from considerations of public policy, and in order to favor the free circulation of bills of exchange and other negotiable paper, looks with favor upon the holders of a bill who has given value for it, and requires very cogent evidence to convict him of *mala fides*.

Where is the fact in this case, which can justly be said to bring home to the mind the conviction, that the plaintiffs acted in bad faith? It is not pretended that they had any, the slightest actual notice, that *Partee & Co.*, the former holders, had an equitable interest in the excess of the bill over \$2980, (the cash they had received upon it,) nor that *Lowe* and *Pattison*, had negotiated the bill for a consideration, which was about eventually to fail. Is there anything in the character or occupation of *Wartelle*, which should have excited their alarm? We think not. He was a person professionally engaged in the business of buying and selling bills and notes, and is not shown to have been in bad repute. Is there anything necessarily indicative of *mala fides* in the rate at which the bill was discounted? The evidence does not authorize us to say so, nor can we infer it with what knowledge we have of the pressure, which exists at frequently recurring intervals in the New Orleans money market, and of the precarious character of certain classes of mercantile paper. *Partee & Co.* were willing to borrow at this very time \$3000, at one per cent a week. The rate deducted by plaintiff may be fairly considered, as indicating a doubt about the solvency of *Lowe* and *Pattison*, and a desire to get a premium, commensurate to the risk; but we do not believe a jury of business men in New Orleans would be found, who would say, that such a discount of the bill in question, at that season of the year, would authorize the belief of a suspicion in the mind of the plaintiffs, that *Wartelle*, a bill broker, had not a right to negotiate the bill, and that there were outstanding equities.

We come now to the only other circumstance, on which the defendants rely as indicative of *mala fides*; and that is. that they gave their own acceptances for it to a broker, who, it is said, from the nature of his calling, they should have looked upon as a person authorized to make sales of paper, and not exchanges. Parties, themselves, often make exchanges of their paper. This cross acceptance, for mutual accommodation, are not uncommon among merchants; and we do not see why suspicion should attach, when that is done through an agent, which, if done between the parties themselves, would not be deemed extraordinary. Where we may, under the facts shown, reasonably suppose a state of opinion or belief in a party's mind, which is entirely consistent with honesty and fair dealing, and where there is another hypothesis involving honesty, we are bound, unless the scale clearly preponderates in favor of the latter, to adopt that construction which is in favor of innocence. *Greenwood & Co.* may have reasoned with themselves, that it was for their advan-

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tage to get for their own paper, having several months to run, a sum in cash, and an acceptance, maturing some months earlier, at a rate of discount, which according to their knowledge of *Lowe* and *Pattison's* standing, compensated the risk of the acceptor's failure in the short interval, before its maturity; and *Wartelle* or his principal, might be considered by *Greenwood & Co.*, as looking for their advantage in the bargain to the superior value, which they chose to attach to *Greenwood & Co.'s* paper. It was certainly a circumstance to awaken a suspicion in the minds of the plaintiffs as to the solvency of *Lowe* and *Pattison*, but not necessarily as to the title of *Wartelle*, or those for whom he was acting. But a serious difficulty seems to have arisen in the mind of the district judge, from the fact, that *Greenwood & Co.* gave in this exchange of paper, their own acceptances of bills, drawn on them by planters. He reasons thus. "How did they obtain before maturity, their own paper? That is unexplained. The supposition is, that they had discounted it in market. But, however they obtained it, when it came into the hands of the debtor, it was extinguished, and they had no right to re-issue it to the prejudice of the other parties to it; this must have been as well understood by the brokers who received it from them, as the unusual mode of discounting the defendant's note, must have appeared to *Greenwood*: and either was sufficient to have put any prudent man on his guard."

Now, what the learned judge has said is correct, if what we believe to be the every day course of business, with regard to planter's and factor's papers, is disregarded; but it leads to an unsafe conclusion, if that course of business is considered. But how is justice to be administered among our merchants, if we shut our eyes to what is every day passing before us? And are we not bound to reach the justice of a case, whenever we can do so without violating some inflexible legal rule? We do not hesitate in giving an affirmative answer to this question. Now the general rule of the commercial law, which regulates the rights and liabilities of parties to negotiable paper, are not inflexible. An acceptor, whose obligation on its face is primary, may show, that in point of fact, the maker is his debtor, and that he accepted for accommodation. So when the planter draws on his factor and he accepts, if the acceptor gets the bill into his hands by payment or purchase, he cannot re-issue it, so as to hold the drawer, to the person receiving it from the acceptor. But if the planter sends the bill to the factor for the purpose of enabling him to issue it, when accepted, and so raised money for him on it, he would attempt in vain to shelter himself under the general rule.

It is strange, that the defendants should deduce the inference of *mala fides*, from the plaintiffs having done the very thing which the defendants themselves did. For they, the acceptors, negotiated their own acceptances with *Partee & Co.*

After the best consideration which we have been able to give to this case, we are unable to bring our minds to the conclusion, that the judgment of the court below has done justice between the parties. But as the views we have expressed, are founded rather on our knowledge of the course of business in New Orleans, derived from our professional and judicial experience, than upon the evidence in this particular case, and as it is desirable to know what a jury of merchants would think in a matter of this sort, which involves a question of mercantile good faith, we have concluded, that the safer course for obtaining justice, will be to remand the cause for further evidence, and for a new trial by such a jury.

Judgment reversed; remanded for trial by a jury of merchants; defendant to pay costs of the appeal.

## CHARLES FONDA v. JAMES GARLAND et al. and DANIEL WEAVER.

A broker employed to sell a note, has an implied authority to guarantee it in the name of the vendor: yet, if he do not guarantee it, the vendor is not liable in case of its non-payment.

**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Durant and Horner*, for plaintiff. *Stansbury*, for defendant. By the court:

**ROST, J.** The defendant, *Weaver*, in giving his broker, for sale in the market, the note of *James Garland*, endorsed by *J. W. Kirkland*, authorized him to guarantee it in his name. This was not mentioned to *Fonda*, who purchased it; and, as he took it without the guarantee, it seems to us that it is too late, after protest, to claim the benefit of a promise which forms no part of his contract.

It is true, as observed by the district judge, that there is reason to believe from the evidence, that *Weaver* knew the endorser and drawer of the note to be under protest at the time he sold it. But, they might be under protest without being insolvent; and there is no evidence of their insolvency in the record. It is shown, on the contrary, that a large quantity of movables has been taken under the plaintiff's execution, as the property of one of them.

But, if it was proved that the parties to the note were insolvent at the time of the transfer, to the knowledge of *Weaver*, the only action which could be sustained upon that state of facts is an action for the rescision of the contract and the restoration of the price paid. Civil Code, 2619.

The judgment in favor of the plaintiff is reversed and the petition dismissed, with costs in both courts.

## WILLIAM ROBINSON, Trustee, v. WILLIAM K. DAY.

If, in consequence of the *laches* of the holder, the endorser of negotiable paper be discharged, the holder cannot recover upon a subsequent promise, without showing that it was made with knowledge of *laches*. Yet, where the promise to pay the debt is given in the form of a new note, it is *prima facie* evidence that there was no negligence by which the endorser was discharged from his obligation on the paper which he thus renews.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. J. L. Mathewson*, for plaintiff. *L. Madison Day and Samuel R. Walker*, for defendant. By the court:

**SLIDELL, J.** This is an action, brought in 1850, by the plaintiff, as trustee of the Commercial Bank of Natchez, upon a note of the following tenor:

“\$3007 52. Natchez, May 18, 1843. Twelve months after the fifteenth day of May, 1843, I promise to pay, without defalcation, to the Commercial Bank of Natchez, or order, for value received, three thousand and seven dollars and fifty-two cents, negotiable and payable at the Commercial Bank of Natchez.

“Renewable if required.

WM. K. DAY.”

The defendant pleaded a general denial and the prescription of five years. He also alleged that, in 1840, the bank became the holder of a note signed by

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one *Beaumont*, and endorsed by the firm of *Day and Caldwell*. That, as endorser of that note, he was entitled to legal notice of protest; that no such notice was given him; and that in consequence of the failure to give him notice and other *laches* of the holder, he was discharged. That when he gave the present note, in settlement of the other, he was ignorant of his discharge.

There was judgment for the plaintiff in the court below, and the defendant has appealed.

Both parties have assumed, that the instrument is subject to the prescription of five years, established by art. 3505 C. C. and have argued the case, so far as prescription is involved, upon the question, whether an interruption of prescription has been made out.

To prove an interruption, the plaintiff relies on two letters written by the defendant to the plaintiff, both bearing date in May, 1848. One of these letters is not, perhaps, sufficiently definite, taken by itself, to identify the note spoken of with that in the suit. Unaided by other evidence, it leaves the mind in doubt whether it applied to this note, or the note endorsed by the defendant. The second letter, however, is sufficiently explicit on this score, "a note of mine due to the Commercial Bank." Any looseness of phraseology in that portion of the letter which speaks of its origin, is satisfactorily explained by the context, coupled with the defendant's answer in the cause, and the testimony of the cashier.

But, it is said that the letter is not such an acknowledgment as is sufficient to interrupt prescription, because it asserts again and again his inability to pay any thing, and does not, in express terms, acknowledge a liability. This remark about the contents of the letter is true. But the whole tenor of the letter is pregnant with inferences of the conviction, in the writer's own mind, of his liability for the debt, and that judgment would unavoidably go against him if he should be sued. Its scope and purpose seems to be, to represent to his creditor the hardship of pressing him for a liability originating in another's default, and the ruin of his credit and business, if the bank should take a judgment and execution. It is, in substance, an earnest appeal to the mercy of the creditor; a prayer for indulgence, inconsistent with the idea of an absence of liability. "My object in writing to you is, that I think you have been misinformed as to my capabilities to pay that claim." "I assure you it will be hard enough for me to pay that note when I get able, let alone being troubled for it now when it keeps me kicking to support my family." "Very few would give me credit if they knew there was a judgment against me." "I have a large family to support." "If, after what I have said, you still feel it your duty to bring suit, I shall have to submit to my fate with the best grace I can, but it will be very hard on my family." "If you do bring suit it will turn out as I have stated, and will ruin my credit; and I do not say this to prevent you from bringing suit, but I do not want to have my credit ruined." "Please write me as soon as possible."

This letter commences by referring to another letter written to *Robinson*, on the previous Saturday. In that letter he states, that the plaintiff's attorney had called on him to ascertain if he could do any thing towards paying "a note due the Commercial Bank, of which you have the control." He states his inability to pay it; deprecates suit which the attorney threatened, and asks the plaintiff to wait until he writes again. Its tone is like that of the other letter.

We are of opinion, then, that these letters clearly contain, if not an express, at all events a tacit acknowledgment of indebtedness upon the note signed by



the defendant, and an entreaty to the plaintiff not to sue. The first letter also requests the plaintiff to delay his suit until he can write again.

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To treat these letters as not involving an interruption of prescription, would be to enable the defendant to work out an injustice by his own acts. For the entreaty of the defendant, coupled with the tacit acknowledgment of the plaintiff's right, and the declaration of the writer, that a suit would injure him without benefitting the creditor, may well be considered as the inducement which led the plaintiff to postpone his action. It is just to consider him as having relied on the implied acknowledgment in doing so, and it would be inequitable to deprive him now of its protection.

In arriving at this conclusion, we have left out of view the testimony of the plaintiff's attorney of record, which the defendant insists ought not to be heeded, in consequence of the professional relations in which he stood to the creditor, and his not having withdrawn from the prosecution of the suit before he offered himself as a witness in the cause. See *Succession of Harkins*, 2d Ann. 923.

It is said that, in consequence of the failure to protest the *Beaumont* note and notify the defendant as endorser, the note given by the defendant, and upon which he is now sued, is not obligatory. The argument assumes that there was a failure to protest and notify. This is not proved. We have the testimony of the notary, who swears that the note was duly protested on the day of its maturity, and that a written notice of the protest was given to the defendant's partner, personally, the next morning. On his cross-examination, the notary answered: "I have no distinct recollection as to the facts above stated, in relation to the particular note inquired about, but I have a copy of the record of my proceedings in the case of the demand, refusal of payment, and protest of the above-mentioned note, by reference to which my memory, in relation to the facts above stated, is refreshed." No exception was taken to the introduction of this testimony, upon any of the grounds stated in the plaintiff's brief; and it may, therefore, be considered as before us for what it is worth.<sup>6</sup> That, however, is little. For it appears from the testimony, that the officer in question was so exceedingly careless and unfaithful in the discharge of his notarial duties, that his conduct has been the subject of comment in Mississippi, (7 How. 609,) and the district judge properly says: "I feel disposed to attach little weight either to the certificate of the notary, or his statements about his records. They leave the matter uncertain, but do not show that no notice was sent." We leave this testimony out of view; and thus the case stands, without any express proof of notice or protest. But it appears that a few months after the maturity of the *Beaumont* note, Day was sued upon it, as endorser, in Mississippi. If there had been any ground for defence, he would naturally have raised it then. If the protest was irregular, he or his attorney would naturally have gone to the notary's office and looked into the matter. If he had received no notice, that being a matter within his own knowledge would, we may reasonably suppose, have been pleaded. But, instead of anything of this kind being done, it is proved by the cashier of the bank that the Mississippi suit was not tried, but was dismissed, in May, 1843, upon the defendant's giving his own note for the amount.

No failure to protest or notify being shown, the promise to pay the debt, given in the form of this new note, must be considered as *prima facie* evidence that there was no laches. See *Lundi v. Robertson*, 7 East. 236. *Gibbon v. Coggan*, 2 Camp. 188. *Pierson v. Hooker*, 3 John. 68. *Patterson v. Beecher*, 6 Moore. 9; *Chitty* 535. *Tebbetts v. Dowd*, 23 Wendell 381, 387. *Robbins v. Pinckard*, 5 Smedes and M. 51. This case must not be confounded with that class of

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cases of which there are numerous examples in the books, where the holder of negotiable paper has been guilty of *laches*, and that fact appears on the trial. For then the holder cannot recover on a subsequent promise, without showing that the promise was made with the knowledge of the *laches*. See the cases cited by Cowen, J., in *Tebbetts v. Dond*; *New Orleans and Carrollton Railroad Company v. Mills*, 2d Ann. 824.

Judgment affirmed, with costs.

Defendant's counsel applied for a rehearing.

The presumption arising, then, from the execution of the note in suit, is but secondary evidence, at best, of protest. For it is laid down in the books that: "Where higher evidence is shown to exist, all other is secondary." "In such cases mere presumptive *prima facie* or circumstantial evidence is secondary." Cow. and Hill, note 325, p. 423.

And evidence which is secondary in its nature, cannot be received so long as the direct or primary evidence can be had, or is shown to be within the reach of the party. 1 Gr. Ev. sec. 82, and last note to sec. 84. 1 Pick. R. 375. Cow. and Hill, note 414, p. 540.

"Indeed, the rule is general. You shall not be permitted to grope in the twilight of circumstantial evidence when the broad daylight of direct proof is attainable." Cow. and Hill, note 325, p. 424.

And so it has been held by Judge Story, that where it was proved a copy of a note existed, the party must prove it by the copy, and cannot rely on other evidence. 2 Mason, 468.

"For the best evidence of which the nature of the case is susceptible, must always be given." 1 Phil. Ev. 217. Gr. Ev. sec. 82.

Now the direct or primary evidence, which is that of the notary, having been introduced by the plaintiff, and which is proved to be wholly unworthy of credit, the secondary or presumptive evidence arising from the execution of the note, would seem to be clearly insufficient, according to the foregoing authorities. At all events, the presumption is entirely destroyed and overcome by the *laches* which are shown on the part of the holder, in employing a notary, whose acts, as well as his evidence, in relation to the same, are unworthy of any credit whatever.

This, we think, makes it incumbent on the plaintiff to prove, either that the defendant was duly charged, or that he gave the note in suit with a full knowledge of the *laches* of the bank.

Because we have alleged that the *Beaumont* note was not protested, and that defendant gave the note sued on without a knowledge that he had not been duly charged as endorser, and as the evidence in the record shows it to be within the power of the party to prove a protest, had one been properly made, as well as that it is exclusively in his power to prove the note was executed with a knowledge of the facts, had such been the case.

For, one who alleges error, is only bound to prove the same when it is not shown the evidence of the same is exclusively within the power of his adversary 11 L. R. 80. 7 R. R. 418.

The general rule is, that he who affirms must prove; but where the affirmative involves a negative, the proof must come from the other side. *Marc v. Church Wardens*, 8 N. S. 257.

And, moreover, this court has held, that where it is not shown whether any demand was made on the drawee, and the drawer supposing himself liable and promised to pay the draft, it will be presumed there was no demand, and that the promise was made in error, and so not binding. 11 L. R. 17.

How much more then should it be presumed in this case, (and the facts proved fully justify the presumption,) that defendant was not duly charged, and that the note sued on was given in error. At all events, we feel fully warranted in saying, the presumption of a protest, arising from the execution of the note in suit, is fully rebutted by the opposite presumption arising from the evidence in the case. It is therefore incumbent on plaintiff to prove protest, or that defendant gave the note in question with a full knowledge that he had not been properly notified.

2. The next and last ground on which we solicit a re-hearing, relates to the question of prescription.

The opinion of the court proceeds on the ground, that the force and effect of the letters of defendant, are to be determined by the law of Louisiana. In this we would most respectfully suggest there is error, for which the counsel, and not the court, are responsible, as the same was overlooked in the argument.

For, it is now the conceded doctrine of this, as well as of other enlightened courts, that contracts, as to their nature, validity, obligation and interpretation, are governed by the *Lex loci contractus*, unless a different place is stipulated for their performance. Story's Conf. L. sec. 248-280.

Now, the letters of defendant would seem to be clearly within the reach of this principle, since an interruption or renunciation of prescription is in the nature of renewal of an obligation. 9 R. R. 313. 1 R. R. 335-6.

The note sued on was executed, as well as payable, at Natchez, and the letters were addressed to *Roberts* at that place. Their nature and effect, then, must be determined by the common law which prevails there, and of which this court will take notice.

It has been expressly held in Massachusetts, that where a proposition is made by a letter written in one State, and sent to another by mail, the latter is the place where the proposition is made, and not the place where the letter was written. 3 Met. Rep. 207.

So it has been held, that where plaintiff wrote by mail to defendants, inquiring on what terms they would insure his vessel, and defendants replied at a certain rate, but by mail of next day retracted. Plaintiff, before he did or could receive the second letter retracting, sent on an acceptance. *Held*: no contract had been made. 1 Pick. 578. See 10 Ib. 324.

These decisions evidently proceed on the ground, that the offers are to be considered as made at the place where the letters are addressed, and not at the place where they were written.

The same rule must apply to the letters of defendant, for there was no admission made until the receipt of the letters by *Robertson*.

The mail in the one case, and the boat in the other, were but the bailees of defendant, and the letters are, therefore, regarded as still in his possession, until actual delivery at the place of destination; and this, more especially, as the rules prescribed by the Postmaster General expressly authorize the writer to withdraw a letter, any time, before delivered to the person to whom addressed. Regulations Post Offices, ed. 1847: Chap. 24, Delivery of Letters; chap. 27, Letters Forwarded; chap. 28, Return of Letters.

In England and France a different rule is prescribed. A letter mailed there cannot be withdrawn. Hence, so far as the present point is concerned, the English and French authorities would be inapplicable.

The defendant, then, having the absolute control over his letters until an actual delivery at Natchez, his admissions as to their nature, obligation and effect, must be settled according to the law of that place.

This is a material distinction, and one, which it allowed to prevail, will fully sustain the plea of prescription, as the letters are wholly insufficient to avoid the plea according to the common law, if not by the civil law.

It is expressly laid down that it ought clearly to appear in all cases, that the acknowledgment relates to the identical debt which is sought to be recovered on the strength of such acknowledgment. 9 Cow. 678. 15 J. R. 511. Ang. Lim. 254-5, § 4.

And if effect can be given to the admissions, without referring them to the demand upon which the suit may have been brought, they ought not to be considered as referring to such demand. 3 Wend. 352. 6 Pet. 86. 21 Pick. R. 323.

Re-hearing refused.

ROBINSON.  
v.  
DAY.

## HUNTINGTON v. THE SHERIFF OF THE PARISH OF JEFFERSON AND THE BANK OF LOUISIANA.

A judgment, overruling an exception taken to the plaintiff's petition, on the ground of its insufficiency to authorize the injunction he had obtained, is not final, may ultimately work no injury, and is therefore unappealable.

**A**PPPEAL from the Fifth District Court of New Orleans. *W. D. Hennen*, for plaintiff. *A. A. Frayser*, for defendants. By the court:

EUSTIS, C. J. The defendants appealed from a judgment by which an exception to the plaintiff's petition was overruled. The exception was to the sufficiency of the plaintiff's petition, to authorize the injunction he had obtained, so far as it related to the Bank of Louisiana.

This is not one of those judgments from which an appeal can be taken to this court. It is not final, and may ultimately work no injury to the appellants.

This appeal is dismissed with costs.

## SAMUEL W. OAKLEY v. JAMES DRUMMOND.

A purchaser of land, who suffers it to be seized and sold as his own, who buys it in and sells it again, cannot be relieved from paying the purchase money to his vendor, on the ground that there are encumbrances upon it.

**A**PPPEAL from the Third District Court of New Orleans, *Kennedy, J.* *Benjamin and Micou*, for plaintiff. *Mott*, for defendant. By the court:

ROST, J. It is unnecessary to inquire into all the questions raised by the defendant in this case. He suffered the land he had purchased from the plain-

OAKLEY  
v.  
DRUMMOND.

tiff to be taken in execution and sold as his own property, to pay repairs made to the levee in front of it. The certificate of mortgages, read by the sheriff at the sale, had exclusive reference to the mortgages standing on the property, in his name, and expressly mentioned the mortgage in favor of the plaintiff, to secure the price of the land. He was present at the sale, and the property was adjudged on his bid; but he caused it to be placed in the name of his nephew, a young man lately come to the country, who, one of the witnesses thinks, was not of age. He took from his nephew, at the same time, a power of attorney, under which he has since sold the land with the boundaries mentioned in the sale of the plaintiff to him, at a profit of \$400 on the price he was to pay.

There is little doubt that the land was purchased by himself, and that the title given to his nephew was a simulation; but, if the sale had been to a purchaser in good faith, the defence could not be sustained. The defendant being present at the sale, and bidding, acknowledged himself in possession as owner; and the sale, under those circumstances, must be considered as having been made by himself. If the adjudication is set aside, he is bound to return the land, and, as he has placed it out of his power to do so, he would be enabled to commit a fraud, if he was dispensed from paying the price. It is unnecessary to inquire whether the defendant may not, under certain circumstances, rightfully claim hereafter a diminution of the price.

Having parted with the title, and no claim being made against him, he has no right of action against the plaintiff.

It being proved that the land is now free from mortgages, the judgment in favor of the plaintiff must be affirmed.

Judgment affirmed, with costs.

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### HOOPER v. OWENS.

A suit to rescind the sale of a slave, cannot be sustained where the plaintiff has been guilty of neglect in not promptly giving her the benefit of medical treatment.

**A**PPEAL from the Second District Court of New Orleans, *Lea, J. Vandalson*, for plaintiff. *T. W. Collins*, for defendant. By the court:

EUSTIS, C. J. For the reasons given by the district judge; judgment affirmed.

The reasons of the District Judge: "Plaintiff sues for a rescision of a sale of a slave (*Elizabeth*) sold to him by defendant, on the ground that she was unsound at the time of the sale, and her disease is such as to render her unfit for the purposes for which she was sold. The evidence, which is however somewhat conflicting, appears to establish the fact that the slave is affected with abdominal dropsy, owing to some affection either of the womb or liver. On this point, the testimony of the physicians is conflicting. It is highly probable that the disease existed at the time of the sale, but it is not shown that she received medical treatment before the month of August, 1850. The sale was passed on the 25th February, 1850. This fact alone is, in my opinion, an insuperable barrier to a recovery. See *Stackhouse v. Kendall*.\* The physician, *Dr. McIlhenny*, who treated her, says, that at the time he first saw her, in August, she was incur-

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\* Decided 14th April, 1851, by *Rost, J.*, but not reported. See Appendix.

able, but that he cannot say that if she had received good medical treatment within the first three months after the sale, she might not have been cured. *Dr. Compton's* testimony sustains this opinion, and they are both witnesses for plaintiff. Under these circumstances, it appears to me unnecessary to enter into an analysis of the testimony, for the purpose of fixing the precise time when, or the cause whence the disease originated; no conclusion, having the character of legal certainty, can be drawn from it. I think the defendant is entitled to a final judgment in her favor.

"The court, after duly considering this case, for the reasons assigned in the written opinion, this day delivered and on file: It is ordered, adjudged, and decreed, that there be judgment in favor of defendant, *Helen Owens*, and against the plaintiff, *Levi E. Hooper*."

HOOPER  
v.  
OWENS.

### SUCCESSION OF JOSEPH FOWLER.

Where, for a number of years, an agent rendered important services to his principal, although there was no contract for compensation, nor any intention to charge for his services while their relations existed; yet, where, from their habits of friendly intercourse and from the evidence, it may be inferred that the one intended and the other expected that, upon the termination of those relations, a liberal reward would be made for the services, and the principal died intestate and without making any reward, the agent may recover from the succession a reasonable compensation.

The general rule of the Louisiana Code is, that a mandate is gratuitous; but where, from the nature of the business or conduct of the parties, it appears that no such thing was intended or expected, the law is otherwise.

It cannot be presumed of one who has been released from his debt to a creditor, by a discharge in bankruptcy, that services, subsequently rendered to the creditor, as agent, are intended to be gratuitous; and the fact that friendly relations existed between the parties, does not assist the presumption. A moral obligation cannot compensate one which is legal.

### APPEAL from the Second District Court of New Orleans. *Lea, J.*

*John R. Grymes*, for the plaintiff: The appellants oppose all compensation, and insist that the relations between the parties are to be governed by the law of mandate, which, they say, is in its nature gratuitous, and none can be allowed under Art. 2960 of the Civil Code. For all the purposes of this case, the appellee is perfectly willing to meet them on this ground.

It is admitted that, by the Roman law in its earlier stages, the contract of mandate was gratuitous in its nature and in its essence, but the spirit of progress, and the necessities of the more complicated nature of human affairs, compelled the Roman jurisconsults to relax the rigour of the law in this respect, and although they would not allow the action *mandati*, yet they would allow the action, *prescriptis verbis* or *in factum*, as on a contract without name, a *persecutio extraordinaria*. But, by the laws of France, under the regime of the Code Napoleon, and under the Louisiana Code, although the contract of mandate is in its nature gratuitous, it is not so in its essence. The court will find this matter very satisfactorily treated and explained by Mr. Troplong, in his work, *Du Mandate*, No. 154 to No. 175 inclusive. See also 18th Duranton, No. 197.

Such is the doctrine, long established in this State, under the legislation of the Louisiana Code. The contract of mandate is not essentially gratuitous; a contract for compensation is lawful. Express proof of it is not required, it may be implied, from the nature of the services and all the circumstances of the case. *Decour's Heirs v. Planterigne*, 10 L. R., 503. *Waterman v. Gibson*, 5th Ann. 672.

But the appellee is persuaded that, independent of the contract and law of mandate, the law entitles him to, and will give him an action to recover, a reason-

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| 7    | 207  |
| 44   | 72   |
| 7    | 207  |
| 47   | 342  |
| 7    | 207  |
| 49   | 778  |
| 49   | 1422 |
| 7    | 207  |
| 58   | 461  |
| 7    | 207  |
| 4105 | 601  |
| 105  | 808  |
| 7    | 207  |
| 119  | 214  |

**SUCCESSION OF FOWLER.** able compensation for the services rendered the deceased in his lifetime, under the circumstances developed by the evidence in the record, on the principles laid down by this court. *O'Reily v. McLeod*, 2d Ann. 146. *Police Jury v. Hampton*, 5 N. S. 389. 5 R. R. 181. 18 L. R. 539. L. Code, arts. 2274, 2278.

See also Rolland de Vellarque *Traite du Notoreal verbo mandat*, vol. 4, p. 449, No. 11. *Merlin R. de Juris*, vol. 21, *verbo notaire*, §6, No. 4, and the decisive argument of Pothier there quoted. Dalloz, 1827, part 2, p. 184, a case exactly like the present. *Journal du Palais*, vol. 21, p. 337. *Project du code du commerce*, prepared by Livingston and others, art. 189. *Sirey*, vol. 27, part 2, p. 102. *Sirey*, vol. 36, part 2, p. 503. *Journal du Palais*, vol. 21, p. 129.

The appellee therefore prays that the judgment of the court below may be reformed or reversed, as he has prayed in his answer to this appeal, now on file, and that, in all other respects, it may be affirmed.

*Roselius*, and *Race and Foster*, for defendant: How does it happen that *Mr. Bogart* does not make any charge for his valuable services rendered previously to the year 1843? This question is answered by the fact that, in 1842, he applied for, and obtained a discharge from his debts, under the Act of Congress, establishing a uniform system of bankruptcy. He was, of course, bound to make a surrender of all his property, embracing all claims he might have a right to make against his debtors, to his creditors. But no claim whatever against *Joseph Fowler* is found on his schedule. How can *Mr. Bogart* account for this omission, except on the ground that he had no claim against *Mr. Fowler*? In order to obtain the benefit of the bankrupt law, and have all his debts cancelled and expunged by a decree and discharge in bankruptcy, he was bound to divest himself of every thing he owned, or was due to him, in favor of his creditors. *Joseph Fowler* was one of his creditors for upwards of sixty thousand dollars, consequently, if he had any offset to make against this large debt, is it possible to believe that he would have omitted to state it?

What then is the irresistible conclusion to be drawn from these facts? No other than this, that the claim for fifty thousand dollars is a mere after-thought; and that if *Fowler* had lived, *Mr. Bogart* would never have had the remotest idea of making it; nay, that the kind offices rendered by *Bogart* to *Fowler*, proceeded from the noblest motives of human action; gratitude for the benefits conferred, and feelings of friendship, originating from the intimate relations which had so long subsisted between them, commencing as far back as 1825, when *Mr. Bogart* was first employed by *Fowler* as his confidential clerk.

Now, we would ask, by what course of reasoning can an impartial and intelligent mind be brought to the conclusion, that it ever entered into the contemplation of either *Bogart* or *Fowler*, during the lifetime of the latter, that the services rendered by the former should be compensated by the payment of fifty thousand dollars, or any other sum of money? From what source does this pretended obligation arise? It is admitted that the services were rendered as agent; and the law is express, that "the procuration is gratuitous, unless there have been a contrary agreement." C. C., art. 2960. But the learned counsel for the appellee insists, that this agreement need not be proved to have been made in express term, and that it may be established by implication; or, in other words, that it may be inferred. It was hardly necessary to cite authorities in support of a position which is self-evident. There are few contracts indeed, the existence of which may not be implied from facts and circumstances. One of the most important frequent contracts, that of sale, is, in many cases in commercial dealings, implied from the contract and acts of the parties. No one, therefore, would even seriously contend that an agreement to pay an agent a compensation for his services might not be implied. But, on the other hand, it is equally plain that there must be some other foundation for the implication, than any thing that is disclosed by the evidence in this record.

We all agree that the contract of mandate, according to the law of Louisiana, is, by its nature, gratuitous, instead of being essentially so, as under the Roman law. The inquiry then arises, what is of the nature of a contract? This question is answered by the second paragraph of the 1757th article of the Code: "things, which, although not essential to the contract, yet are implied from the nature of such agreement, if no stipulation be made respecting them, but which the parties may expressly modify or renounce, without destroying the contract,

or changing its description; of this nature is warranty, which is implied in every sale, but which may be modified or renounced, without changing the character of the contract, or destroying its effect." See Pothier on Obligations, No. 7. SUCCESSION OF FOWLER.

Hence, the gratuitous character of the contract of mandate is understood when no express or implied stipulation to the contrary has been made by the parties. In the present case, it is not pretended that an express agreement to compensate the mandatory for his services, has been shown: the question then recurs, is there any evidence, or are there any circumstances from which it may be implied? There are none, unless the disappointment of *Mr. Bogart*, in not being remembered in *Fowler's* will, be considered so. Indeed, the whole argument of the learned judge of the district court seems to rest on that fact. All the acts and declarations of *Mr. Bogart*, already referred to, so utterly irreconcilable with the pretensions now set up by him, are attempted to be accounted for and explained away by his expectation of a remunerative legacy! Fortunately for the peace and harmony of society, litigation is rapidly decreasing; but, let it once be known, that every disappointed legacy hunter can maintain an action for the recovery of fifty thousand dollars against a wealthy succession, for his apparently disinterested acts of friendship and attention to propitiate the good will of the rich man while living, and the dockets of our courts will soon be crowded. But, if *Mr. Fowler* intended to reward his friend for the services rendered, by remembering him in his will, how does it happen that he destroyed the will which he had made.

Not a single one of the cases cited by the counsel for the appellee, supports the position in support of which they are invoked.

The leading principles applicable to the case, are developed with great force and clearness by Troplong, in his treatise on Mandate, No. 153, *et seq.*

The only case in point is that of *Jacob et al. v. The Ursuline Nuns*, 2 M. R. 269. 1 Greenleaf, § 15, 27. C. C. 2270. *Elkin's Heirs v. Elkin's Ex.*, 11 L. R. 224. 13 Wendell, p. 464. 4 Dallas, 111. 13 Johns. R. 379, are also referred to.

By the court:

PRESTON, J. *Joseph Fowler* departed this life in September, 1850. He died intestate and without heirs in this State. He was possessed of a very large estate in New Orleans, and *W. Bogart* was appointed curator of his succession.

In July, 1851, he rendered the account of his curatorship and claims from the estate, besides his commissions, the large sum of fifty thousand dollars. The heirs oppose its allowance.

In answer to their opposition, he stated as the grounds of his claim, that it is for constant and continuous and uninterrupted attention to all the business of the deceased, for the whole of the period, from 1843, to the time of his death, the deceased being a large owner of real estate in the city of New Orleans, requiring constant attention to the renting and repairing his houses, collecting the rents, and all other attention and services necessarily incidental to a large mass of such property. The deceased was also a capitalist, dealing largely in money, making loans on mortgage, and discounting notes to a large amount, all of which was attended to, solely and exclusively by the respondent, constantly and unremittingly, his counting room being the place where all the books, papers, and valuables of the deceased were deposited.

His witnesses in support of the claim are, *R. J. Palfrey*, the cashier of the bank in which the deceased kept his personal assets, consisting, at his death, of good bills, receivable notes and mortgages, amounting to upwards of eight hundred thousand dollars; *J. K. Smith* and *L. F. Generes*, extensive money brokers, who had large transactions with him; *Samuel J. Peters* and *W. H. Avery*, both presidents of banking corporations, and old established merchants of New Orleans; *Lavillebeuve*, a merchant and large property holder; *J. W. Montgomery*, a large capitalist, and who appears to have been intruded

SUCCESSION OF with an olographic will of the deceased, but which was destroyed; *Mr. Fowler*.

*Grymes*, his confidential counsellor; and *Dr. Rushlon*, his physician.

All these gentlemen were well acquainted with the deceased and his business, the relations between him and the claimant, and, in general, the means by which his vast fortune was accumulated. Their testimony makes out fully and satisfactorily, the grounds stated by *Mr. Bogart*, as the basis of his claim.

The deceased laid the foundation of his fortune by great activity, and energy and good judgment in mercantile operations. Retiring with a considerable capital, and uncommon sagacity and knowledge of men and things, he selected the claimant as his agent, through whom still to operate with his capital on the bills, notes, and other evidences of credit, so exclusively the medium of our commerce. That his selection was fortunate, is proved by the result; the ball was kept rolling and increasing in magnitude, to the hour of his death. While a different selection might have proved disastrous, from circumstances peculiar to *Fowler*, to which some of the witnesses allude.

His physician says, he was in bad health during the whole of the seven years, for which compensation is claimed; that he had fallen into such a disposition, that he would walk a mile to save a dime, but would not cross the street to make thousands. Although the remark of the witness was probably intended merely to illustrate his character, those acquainted with the effects of avarice upon age and infirmity, know that it is literally true, rather than a mere illustration of the character of a miser; and yet he was daily making large sums through the instrumentality of his agent. He was, at the same time, saving dimes by denying himself the comforts and even necessities of life, as proved by the physician; whilst he was on the eve of losing a very large sum, as proved by his counsel, from mere listlessness, though warned of the danger, and which was saved by the promptness and energy of his agent when it was communicated to him.

In the latter part of his life, there were physical disabilities which rendered the services of the agent the more invaluable to him. At one time he was confined six months by sickness. He became intemperate and was hypochondriacal, saying he would die in a week, when, but for the effect of intemperance on his debilitated and irritable system, he would possibly have lived to an old age. He was also often absent during the summers.

The aggregate testimony of the claimant's witnesses shows, that the deceased referred all his customers and business to him, and kept it all in his counting house, and that whether he was sick or well, present or absent, the agent was, to use the expression of one of the witnesses, substantially his curator for three years before his death. These gentlemen, men of the highest standing in the community, estimate his services as worth fifty thousand dollars to *Fowler*, during the seven years. *Mr. Urquhart*, an extensive agent for absent capitalists and property holders, furnished the court with specific data upon which he acts, which appear very reasonable, and which would fully justify the demand of the claimant.

On the other hand, the heirs show two very large operations, amounting to \$130,000, which *Mr. Fowler* transacted personally. They show that he discounted the paper of the mercantile firm of the agent, to the amount of upwards of \$200,000, and that his credit gave them great facilities in the commercial world, and patronage from the planters of our country. They urge that the agent was obliged to avail himself of the benefit of the bankrupt law,



and was then indebted to the deceased in a sum of \$60,000, which there is a SUCCESSION OF FOWLER. moral obligation upon him to pay; and that he has received \$30,000 for commissions, as curator of the estate.

There was no contract between the parties, nor do we think any intention on behalf of the claimant, to ask payment for his services while their relations existed. But we do firmly believe, from their relations and the evidence, that the one intended, and the other expected, that if their relations terminated, a very liberal reward would be made for those services. The nature and character of aged avarice rendered it morally impossible, that that reward would be made during life, and the early and long continued friendship of the parties, and great reciprocal kindness, rendered it impossible to ask it until *Mr. Fowler's* death, or other separation.

Can the compensation then be legally demanded from the heirs of the deceased? The general rule of our code is, that a mandate is gratuitous; but is it so, if the nature of the business or conduct of the parties show, that no such thing was intended or expected. The contrary is the well settled jurisprudence of France, under a code very similar in its provisions to our own. In preparing a commercial code for our State, our distinguished juriconsults expressly engrafted the principle into their project, and it is so perfectly conformable to every man's sense of justice, that we feel bound to act on the principle; and, in fact, did adopt it in the case of *Waterman v. Gibson*, 5th Ann. 673. The cases of *Jacob v. The Ursuline Nuns*, 2 M. R., and *Elkin's Heirs v. His Executor*, seems to recognize the principle, that if it could be reasonably concluded that compensation was contemplated by both parties, it should be made.

Now, in addition to the testimony of his witnesses, a book is before the court, showing the accounts kept by the claimant of the transactions of the deceased, in the purchase of notes, bills and mortgages, and collections of his rents. It is well kept, and shows the transactions to have been of the largest character. The mental and manual labor of keeping the accounts, making the calculations of interest, securing the investments and collecting the principal and interest, making the rent rolls and bills, and collecting the rents, keeping the property in repair, insuring it, and securing good tenants, must have been so considerable, that no man could think of giving or receiving it for nothing.

Whilst, however, the books show the labor and responsibility of the agency to have been great, the evidence convinces us, that the value of the claimant's services to the deceased consisted, principally, in the skill and judgment with which he managed his immense business, so that it produced such a wonderful result. The business being, as the deceased stated over and over again, intrusted principally to that skill and judgment, or, as he expressed himself, more than to his own. The agent did not give advice alone, as contended, but exercised his own judgment and moral responsibility in investing the funds of his principal. He is not to be considered a mere clerk, of whose salaries *Mr. Robb*, *Mr. Peters* and *Mr. Avery*, give an account.

It does not appear that the relatives and heirs of the deceased, during these seven years, had any connection with, or influence over him, or extended to, or received any kindness from him. On reading the testimony in this record, they must see and feel that their deceased relative has received from a stranger to them, the greatest kindness and services, which relieved him from the burdens of business, for which he was physically inadequate, and probably protracted his sickly, intemperate, and irritable life; thus increasing by time alone their

**SUCCESSION OF FOWLER.** of vast inheritance, and, thereby, that the toil, skill and judgment of that stranger has been invaluable to them, when separated from their relative by a no doubt unreasonable aversion, which is proved. We do not think the laws interpose any obstacle to his demand for a reasonable compensation from them.

As already mentioned, they contend, that prominent facts proved by them, justify their opposition to the claim, even if well founded in law.

They say, that in applying for the curatorship of the estate, he represented that there were no creditors, and could not therefore be a creditor himself. He was not; he owed the estate far more, immediately or contingently, than he could possibly expect to recover for his services.

They contend, that the claimant availed himself of the benefit of the bankrupt act of 1841, being a large debtor of the deceased, and that there is a moral obligation to make payment, and the debt should be compensated against his services. The moral cannot be opposed to the legal obligation of the heirs to compensate his services. Besides, by an examination of the testimony, we find that the deceased realized nearly his whole debt and interest, out of property purchased at the bankrupt sale. It is notorious, that large mortgagees on large property, were enabled to purchase it at the bankrupt sales for small sums, and did so, to a great extent, to avoid the expenses of the sales for large prices. The property purchased by the deceased from the assignee of the claimant, was placed also under his charge, and, by his skill and management, the debt was realized by the deceased, so that perhaps the moral obligation to pay it is extinguished.

The heirs say, that the claim should not be allowed, because the claimant obtained the curatorship of the estate of the deceased, and thereby realized in a single year thirty thousand dollars out of the estate in commissions, as curator. But these commissions are allowed by law, as the legal compensation for the trouble and responsibility of administering the estate, and are not dependant at all upon the relation of debtor and creditor between the curator and the estate.

All the heirs were absent when *Fowler* died. It was in the middle of what is called our sickly season, when strangers are deterred from coming to New Orleans. The estate was vacant, and immediate action necessary for its preservation. Circumstances necessarily subjected the heirs to the expense of the commissions, whether the claimant administered or not. If he had not, persons less qualified by intimate relations with the deceased, would have administered, and successfully claimed the same commissions.

It is said, the credit given by the deceased to *Mr. Bogart* and his house, amply compensated him for all his services. The services are palpable, and susceptible of legal appreciation by testimony. The credit given by a business mutually beneficial, is not susceptible of precise appreciation in money. The claimant contends, and proves by the books, that the deceased received as high interest for the loans to himself and house, as from other customers, and that, to his knowledge, his investments with them were equally secure.

Still, the evidence satisfies us that this matter should be well considered, in fixing the compensation to be allowed the claimant. And for two other striking and many minor reasons, we do not feel authorized to adopt, as the measure of his remuneration, the large estimate made by his witnesses.

1. The claimant might have insisted, which in all cases is the true course, on a precise and definite understanding with his employer. He being a man, not only not generous, but penurious, would in all probability have insisted on a

small compensation, although payable only when their relations should terminate; and having right to do so, we must consider his views, as well as those of his agent. SUCCESSION OF FOWLER.

In the next place, notwithstanding the judicious and successful administration of *Fowler's* property, yet the agent was able to devote all the time necessary to carry on the large mercantile business of his own house, which was greatly aided in its operations by the discounts of *Fowler*, although based upon the principle of interest.

Without entering into further minutiae, upon a full consideration of the whole record, we should have come to the same conclusions with the District Judge, and therefore affirm his judgment, with costs.

### CHARLES FONDA v. E. D. BEACH.

*Garland* was arrested. He was released on giving a bail bond, with *Beach* as his security, conditioned that he should not depart from the State for the term of three months, without leave from the court. *Garland* left the State without the leave of the court and within the term, but returned shortly after its expiration.\* The question was, whether the surety was bound.

PRESTON, J., held, that the surety was discharged, on the ground that the bond was not intended to prevent a temporary absence, but a permanent departure by the debtor, without making a surrender of his property.

SLIDELL, J., concurred in the decree of PRESTON, J.

EUSTIS, C. J., with whom ROSE, J., concurred, held, the surety was bound, the condition of the bond being broken.

A surety on such a bond, after its condition has been broken, and after judgment rendered against the principal, cannot be allowed to falsify the affidavit under which the proceedings were instituted.

**A**PPPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Durant and Horner*, for plaintiff. The security bound himself absolutely to pay *Garland's* debt, in case he departed from the State within the term of three months. The condition having happened, the security is bound. He chose to bind himself in this manner to the sheriff and plaintiff, and must now be held liable for the debt. The bond would be, in the language of Judge Bullard, "quite nugatory, if it were not held to be absolutely forfeited by the departure of the principal, at least, after a return of *nulla bona* on execution against the principal." *Lindley v. Hagens*, 11 R. R. 204.

The fact has been already shown, that the principal, *Garland*, did himself take a rule to set aside the writ of arrest, which was discharged; and this fact forms the basis of the third ground of objection to the admissibility of the testimony. The reasons given by the judge for discharging this rule of *Garland's*, are conclusive, and, what is remarkable, seem entirely discordant with his judgment in favor of *Beach*, the surety. If the arrest cannot be set aside for *Garland*, because "more than three months have elapsed since the arrest was issued, and the same has become inoperative," *a fortiori*, it cannot be set aside for *Beach*, the surety.

*Villeré v. Armstrong*, 4 N. S. 21. "Under the common law, although it is a rule that the defendant cannot, in general, waive an error apparent upon the record, without giving a release of errors, yet no objection can be taken to the sufficiency of the affidavit to hold to bail after the plaintiff has been permitted to take a subsequent step in the cause. Hence, where the defendant, not being

\**E. L. Backus* and *Alexander Scott* testified, that *Garland* returned to the city of New Orleans on the last of October or first of November. *Joseph West* testified, that he returned on the 20th of October.

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under an arrest, has voluntarily given a bail bond, or has put in or perfected bail, or pleaded to the action, or suffered judgment by default, and notice of executing a writ of inquiry has been given, the defendant cannot, after such an implied acquiescence in the plaintiff's proceedings, object to the affidavit to hold bail." Petersdorf on Bail, p. 196, 10 Law Library, 109.

*Van Matre*, for defendant.

PRESTON, J. The articles 212 and 214 of the Code of Practice, authorizing the arrest of debtors, was amended by the Act of 1840, "to abolish imprisonment for debt." The 2d section of the Act authorizes the creditor to have his debtor arrested, on making oath that he believes him about to depart, permanently, from the State, without leaving in it sufficient property to satisfy his demand.

The supplemental Act of 1840, required the debtor, on his arrest, to give security not to depart the State for the term of three months. The 3d section of the first Act of 1840 made the condition of the bond to be, that the surety should pay the debt if the execution against the principal was returned unsatisfied.

The object of the arrest, still allowed by our laws, notwithstanding the abolition of imprisonment for debt, was to prevent the permanent departure of the debtor from the State, without satisfying the debt, or making a surrender of his property to his creditors.

The oath required has no reference to a temporary absence of the debtor, nor was the arrest designed to prevent his temporary, but permanent departure. If the debtor is unable to give security, he may be imprisoned three months, and must then be discharged; but upon condition of surrendering his property, if required by the creditor, setting forth in a petition to the court, that the debtor had property which might be made available to his creditors.

If the debtor be released on giving bail, the same condition is, by implication, attached to his bond, that he cannot be discharged from liability, under the bond, until the lapse of three months after his arrest, and then, only, on condition that he surrender his property to his creditors, if required. The object of the imprisonment, and of the bond consequent upon the oath, and the arrest, being the same, the conditions of both must be the same. Both were intended to prevent a permanent departure, by the debtor, without making a surrender of his property, if required; both are satisfied if he does so. And both these means of effecting the same object, cease, under the law, at the end of three months, if the creditor does not require, within that time, the surrender of the debtor's property.

The district court very properly refused, in this case, to make an order, as to the debtor, rescinding the arrest, because it had become inoperative by the lapse of the three months. In like manner he should have released the surety, because the three months had elapsed without the permanent departure of the debtor, during which time the creditor might, but had not required the surrender of his property. The surety had prevented a permanent departure of the debtor, during the term allowed to the creditor to require a surrender of property. That property remained subject to his execution, but the person of the debtor was no longer subject to the control of the creditor, under the law abolishing imprisonment for debt.

I do not concur in the reasons given by the district judge for his judgment, that the debtor had no intention to depart permanently when arrested; but upon the principles stated, I think his judgment should be affirmed, with costs.

SLIDELL, J. This case involves the construction of the Act of 28th March, 1840, and the supplementary act of the same year. The first Act is entitled

"An Act to abolish imprisonment for debt," p. 131, a title which seems by no means to harmonize with the body of the statute.

The interpretation of much of this statute is involved in serious difficulty, and I confess myself embarrassed in attempting to apply it to this particular case. As the surety's liability under the statute, and the proceedings and evidence in this cause does not seem to me clear, I prefer to leave the judgment of the district court undisturbed.

EUSTIS, C. J., dissenting. The plaintiff, who was a judgment creditor of *James Garland* and others, took a rule on *Beach*, who was one of the sureties of *Garland* on a bond given for his discharge from arrest, for him to show cause why judgment should not be rendered against him on his bond, the condition thereof having been broken by *Garland's* having left the State within ninety days from the date of the same.

The defence of *Beach* was, that the arrest of *Garland* was illegal, inasmuch as the affidavit on which the order of arrest was issued was false, and that *Garland* was not, at the time, about permanently to depart from the State. Evidence was heard on the trial of this rule, and the district judge was satisfied that *Garland* had not intended permanently to leave the State, and discharged the rule, holding the surety to be released from his suretyship.

The plaintiff has appealed, and the question has been argued as to the sufficiency of the matter of defence presented on behalf of the surety.

It is objected that this defence comes too late, because the bond had already become forfeited, and judgment been obtained against the principal, *Garland*.

The petition was filed on the 12th of July, 1851. *Garland* was arrested under the second section of the Act of March, 1840, entitled "An Act to abolish imprisonment for debt." He was released on giving his bond, with *Beach* as one of his sureties, conditioned that he should not depart from the State for the term of three months, without the leave of the court; or in case of his departure without such leave, that the said *Garland*, or his sureties, shall pay the amount of the judgment rendered in the cause, &c.

*Garland* immediately left the State, and did not return until November following. Judgment, by default, was taken against him, but before it was confirmed he obtained a rule against the plaintiff, having for its object to set aside the writ of arrest. The rule was discharged, on the ground that more than three months had elapsed since the arrest. The ground on which this rule was granted, was the alleged falsity of the plaintiff's affidavit, and the consequent illegality of arrest, &c. Execution was afterwards issued on the judgment against *Garland*, and on the return of *nulla bona*, the present proceeding was taken against the surety.

The bond given in this case, under the statute, resembles that formerly required from debtors in custody, to enable them to enjoy what were then called the prison limits which, in New Orleans, at one time were confined to a single street, but afterwards, in 1823, were extended to the limits of the city. The debtor, arrested under this act, has the whole range of the State, and the object of the law giving the creditor the right to restrain him during the three months, is to compel him to pay the debt, or to make an honest surrender of his property under the insolvent laws. There can be no question that the departure of the debtor from the State, during this term, without leave of the court or authority from the creditor, operates a forfeiture of the bond. *Thompson v. Blackwell*, 5 L. R. 466. *Gwynne on Sheriffs*, 156. *Landley v. Hagens*, 11 R. R. 204.

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It seems to us repugnant to all sound ideas of justice, to allow a surety on a bond like this, after its condition has been broken and after judgment rendered against the principal, to falsify the affidavit under which the proceedings were instituted. It is contrary to the universal practice, and has no semblance of authority to support it here, or elsewhere, that we ever heard of. In *Dalton v. Barnes*, 1 Merle and Selwyn, 230, Mr. Justice Bayley said, there was not an instance in which the party, after putting in bail above, had been permitted to take advantage of a defect in the affidavit to hold to bail. Petersdorf on Bail, 196. Tidd's Practice, 1044.

In the case of *Thornhill v. Christmas*, cited by the counsel for the defendant, the court permitted the surety, on a bond under this act, to avail himself of the defence that the arrest was not warranted by the statute, it having been made after judgment rendered, as a means of coercing payment by imprisonment, and the proceeding being virtually a reestablishment of the writ of *capias ad satisfaciendum*, which the statute had abolished.

In the cases of *Herrick v. Conant*, 4th Ann. 276, and *Quine v. Mayes*, 2 R. R. 511, the objections of the sureties were to the validity and effect of the judgment which the sureties bound themselves to satisfy.

Rost, J., concurs in this opinion.

### EMILY N. TURNER et al. v. S. H. TURNER.

A part of the heirs cannot claim to be put in possession of the entire estate, to the exclusion of the other heirs, on the ground that the latter were indebted to the deceased at the time of his death, in an amount exceeding their share in the succession.

**A**PPPEAL from the Second District Court of New Orleans, *Lea, J. Mott and Frayser*, for plaintiffs. By the court:

Rost, J. The plaintiffs, who, with their brothers, the defendants, are the heirs at law of *Edward D. Turner*, claim to be put in possession of his entire estate as owners, to the exclusion of their co-heirs, on the ground that the latter were each indebted to *Edward D. Turner*, at the time of his death, in amounts far exceeding their share in his succession; and that this indebtedness has extinguished all right they might have in his estate.

The defendants made no defence, and after an *ex parte* hearing on the judgment by default, the district court nonsuited the plaintiffs.

This action has nothing to rest upon. The title of the heirs is in no manner affected by the amount of their indebtedness to the succession, however large it may be; and the balance for or against them can only be ascertained by a partition made in due form. It is not true, in point of fact, that the indebtedness of each of the three defendants exceeds the value of their share in the succession. One of them is entitled to a large balance, which must be allowed him by attribution when the partition is made.

The homologation of the account of the administrator is binding upon the heirs, so far as he is concerned; but it was no part of his duty, nor had he authority, to make a partition between them; and the distribution indicated by him must be viewed as a mere memorandum, forming no part of the account he was bound to render, and not covered by the judgment of homologation. See *Mylne Asylum v. Orphan Boys' Asylum et al.* 7th Ann.

The judgment is affirmed, with costs.

## NATHANIEL TOWNSEND v. PALMS and JOHN L. LEWIS.

The sheriff charged two dollars per diem for taking care of real property. The district judge reduced the amount to one dollar per diem. The sheriff appealed. The law provides no compensation to the sheriff for taking care of real property. *Held*: The amount allowed was warranted by the evidence.

By the Court: It seems to us that, under the constitutional provision, (art. 71) we are not authorized to reverse the judgment of the district court unless we should find it to be contrary to evidence, as in any ordinary action.

**A** PPEAL from the Third District Court of New Orleans, *Kennedy, J. J. Blodget Brillou*, for plaintiff. *Grymes*, for defendants. By the court:

EUSTIS, C. J. This appeal is taken by *John L. Lewis*, who was the Sheriff of the Parish of Orleans, from a judgment of the Court of the Third District of New Orleans, giving him the sum of five hundred and eleven dollars, instead of the sum of one thousand and twenty-two dollars, claimed by him from *Townsend*, the plaintiff in this suit, for keeping, during five hundred and eleven days, certain buildings and improvements, together with the machinery of a flour mill, on certain lots at the corner of Esplanade and Levee streets, in New Orleans.

The district judge considered the charge made by the sheriff, of two dollars a day, too high, and reduced it, accordingly, to one dollar a day, which he considered a sufficient and fair allowance.

It appears that, in January, 1850, the sheriff took possession of the establishment known as the Union Flour Mills, under a writ of seizure and sale issued at the instance of the plaintiff.

The proceedings were stayed by an injunction which, in May, 1851, was dissolved, but the costs of the injunction suit and of the executory process were, by the decree of the court, to be paid by the plaintiff, *Townsend*.

The sheriff appointed a guardian to take charge of the property at the instance of the plaintiff himself, and there is no question raised except as to the rate of his compensation.

The article 71 of the Constitution provides, that no court or judge shall make any allowance by way of fee or compensation, in any suit or proceedings, except for the payment of such fees to ministerial officers as may be established by law.

There is no provision for the compensation to the sheriff for taking care of real property under seizure, made in any of our statutes, that we can find. The fee bill of 1846 refers to the discretion of the court, the compensation of sheriffs for keeping personal property and slaves legally in the hands of the sheriff, provided that the charge for keeping slaves does not exceed twenty-five cents per day: Acts of 1846, p. 53.

It seems to us that, under this constitutional provision, we are not authorized to reverse the judgment of the district court, unless we should find it to be contrary to evidence, as in any ordinary action. We cannot recognize the usage of allowing the sheriff two dollars a day for services of this kind, the law making no allowance, by way of fee or fixed compensation, for such services. We cannot say the judgment appealed from is not warranted by the evidence in this

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particular case, nor do we think proper to reverse it on a point which involves, in a good degree, the exercise of a sound judicial discretion. The question decided, appears to be one of fact exclusively.

The judgment of the district court is therefore affirmed, with costs.

### J. M. LAPEYRE v. M. A. THOMPSON, GASPARD DIDIER, Intervenor.

Where underwriters execute a policy on which, at the time, there is the endorsement of the assured to pay it over to another, it is a recognition of the assignment, which binds the underwriters. An adjustment of the loss, and a promise to pay to the assignee is binding, and an attachment of the money by the president of the company, as funds belonging to the assured, cannot defeat the right of the assignee.

An adjustment and a promise by the insurers to pay in accordance with it, is equivalent to a settlement, arbitration or compromise, and concludes the parties. An action may be brought on it, or in an action on the policy itself, the adjustment will be evidence of the loss and its amount.

By the Court: It frequently happens, that one man may represent several persons or quality of persons. He may be an executor, a syndic, an alderman, a president of a company, a church warden, &c. What he does in one quality, cannot prejudice him in another. Nor can he transfer what he has in one quality to the other. In each quality, the personation is distinct and so maintained.

**A**PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Lambert and Tissot, and St. Paul and Bonney*, for the intervenor. Marine policies are commercial instruments, transmitted from one part of the world to the other, in about the same manner as the goods they secure. Like bills of lading, their possession is *prima facie* evidence of their ownership, and when this possession is known to have been made by the insured, with the knowledge of the underwriter, it constitutes a complete title.

Park on Insurance, page 450, note A, says, that unlike fire insurances, marine insurances are transferrable instruments.

Burrill's Law Dictionary, vol. 1, *vo.* Assignment, page 102: In assignments, the operative words are "assign, transfer and set over," but any words which show an intention to pass the property, will amount to an assignment.

United States Digest, vol. 11, page 611, No. 997: A policy having been assigned with the assent of the insurer, the assignee can claim for loss happening during the voyage before or after the assignment. 1004. Even after a loss, the insured may assign his interest in the policy without the consent of the insurer.

Same work, vol. 4, page 150: A chose in action may be assigned for a valuable consideration, by the delivery of the evidence of the debt, without any written transfer. Same work, vol. 1, p. 244: All choses in action may be assigned in equity.

No. 30. Thus, a contingent debt may be assigned, and when the debt becomes due on the happening of the contingency, the assignee may sue for it.

No. 36. A policy of insurance is assignable in equity, and every set off, between insurer and insured, prior to the assignment, is good against the assignee. See the following cases: *Gourdon and Insurance Company of North America*, 3 Yeates 327; 1 Binn. 429; 5 Mass. 201; 3 Mass. 515; 8 Wheaton's R. 278.

Watkins on Conveyancing, page 228 (Law Library, 4:) Any words which show an intention to pass the property, will amount to an assignment.

Barbour and Harrington's Equity Digest, vol. 1, page 187, No. 6: A bond may be assigned in general terms. Phillips on Insurance, vol. 1, page 38: The mere delivery of the policy without any other act of assignment, for the purpose of securing the depositary against liabilities assumed by him, has been held to give such depositary a lien on the proceeds of such policy, for the purpose of



such security or indemnity against other claims or proceeds, of which such depositary had no notice at the time of the delivery to him."

*Benjamin and Micou*, for plaintiff.

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By the court:

ROST, J. The judgment in this case, must be affirmed. The words written by the defendant on the back of the policy of insurance before the loss occurred, (paid over to *G. Didier*) were not a giving in payment, and are too informal to have the effect of a pledge against an attaching creditor; the defendant was about leaving for California, and the transfer can be viewed in no other light, than as an authority to collect whatever might become due under the policy, in case of loss by fire. There may have been an ulterior intention between the parties, that any sum thus collected by *Didier*, should go to pay the notes of the defendant which he held, but the sum in controversy was attached by the plaintiff before *Didier* collected it, and before it could have been extinguished by compensation.

Judgment affirmed, with costs.

#### SAME CASE—ON A RE-HEARING.

EUSTIS, C. J. The plaintiff recovered a judgment in an attachment suit against the defendant, and subjected to the satisfaction of it a sum of money, due on a policy of insurance by the New Orleans Insurance Company, which was claimed by *Didier*, an intervening party.

The district judge decided against *Didier*, on the ground that the transfer of the policy to him, was in fact under a contract of pledge, and that it ought to have been made in the form of the contract of pledge then required by the code, and not being so made, it had no effect against third persons, and held the sum due on the policy liable to attachment as the property of its original owner.

This judgment was affirmed by this court on appeal, and on the application of the counsel for the appellant, a re-hearing has been granted.

This insurance was on merchandise shipped by the mail steamer to San Francisco, and bears this memorandum: "Pay it over to *G. Didier*. *Margaret A. Thompson*. N. O. April 14th, 1850."

This transfer was on the policy at the time it was executed by the Insurance Company. A blank policy was furnished by the company to *Didier*, who made the application seemingly as the agent of *Mrs. Thompson*, and brought it back with the transfer written in the margin.

After the loss was known, *Didier* applied for his money. He was told by the secretary to leave the papers, and after examination, if found correct, that the company would settle the loss. The papers were left and submitted to *Mr. Lapeyre*, the president of the company. His opinion was, that they were correct, and that the company would settle; and the secretary of the company told *Didier*, that the papers were correct and that the company would settle. *Didier* made this application for payment in his own name. The company did not settle, for the reason that an attachment of the money was levied, on the same day, in the hands of the company.

The president of the company is the attaching creditor. *Didier* is also a creditor, and was one at the time of the application for insurance. The application for insurance, was made by *Didier* on behalf of the defendant; he had

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been her book-keeper, and he stated as a reason for the transfer of the policy to him, that she was on the point of leaving for California.

It is clear, that the assignment to *Didier* was made valid, as far as the company could give it effect, by their undertaking to make the policy payable to him without any reserve or qualification. It is equally clear that, except in case of error or fraud, neither of which is pretended to have existed, the company was bound by its promise to pay *Didier*, on the adjustment of the loss. This promise, for a sufficient consideration and in the regular course of business, could the principal officer, who is bound to execute it, by any means contrive to defeat for his own benefit? The question almost answers itself. The law of insurance attaches great importance to an adjustment and a promise by the insurers in accordance with it. It was formerly held equivalent to a note of hand. It is still held as equivalent to a settlement, arbitration or compromise, and concluding the parties. An action may be brought on an adjustment or in an action on the policy itself; the adjustment will be evidence of the loss and its amount. *Park on Insurance*, 134. 2d. *Phillips on Insurance*, 523. It became the duty of the president, to execute and carry into effect the contract of the company, and it was incumbent on him as a moral agent, not to defeat that which he was bound to perform. The business of insurance being one in which so large a number of persons are at times obliged to have doings, who can necessarily know little about its rules, must rest in a great measure on principles of equity and honor. And it becomes quite a matter of interest to insurance companies, as well as their customers, that no private interest of their officers should interfere with a prompt and just payment of all their dues.

It frequently happens that one man may represent several persons or quality of persons. He may be an executor, a syndic, an alderman, a president of a company, a church warden, &c. *Homo qui plures personas sustinet*. What he does in one quality cannot prejudice him in another. Nor can he transfer what he has in one quality to the other. In each quality the personation is distinct and so maintained. *Institutes of the Roman law*, by *Makeldey* § 117.

It seems to us, that the plaintiff after having authorized this adjustment and promise to pay the amount due on the loss to *Didier*, in favor of whom the company had originally made the loss payable, could not avail himself of his position and the information thus acquired, in order to defeat the payment, by seizing the fund in the hands of the insurance for his own benefit. To authorize such a proceeding, would be against those just and well established rules which must always be held up and adhered to in matters of insurance.

It does not appear that the plaintiff made use of any pretext or artifice to the delay or detriment of the intervening party, but acted, as we believe, under his own view of his legal rights. *Vide Berrella v. Merle*, 9 L. R. 216. Under this view of the case, we consider that our former decision cannot be sustained, and the judgment before rendered in this case is set aside. And proceeding to give such judgment as ought to be rendered, it is decreed, that the judgment of the district court against the intervenor, *Gaspard Didier*, be reversed, and that the said *Gaspard Didier* recover from the New Orleans Insurance Company, the sum of eighteen hundred and thirty-two dollars and twenty-two cents, with interest from the 8th of January 1850, until paid; and that the plaintiff pay costs in both courts.

CHARLES CAFFIN v. JOHN P. KIRWAN, R. D. SHEPHERD, Opponent.

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A debtor may pledge whatever movable property belongs to him, provided it be susceptible of delivery, either actual, fictitious or symbolical, but a thing which is susceptible of neither of those kinds of delivery, is not susceptible of being pledged.

The mere agreement of the parties, is not equivalent in any case to a fictitious or symbolical delivery, within the meaning of article 3120 C. C.

**A**PPEAL from the Third District Court of New Orleans. *Miles Taylor*, for plaintiff. *C. Roselius* and *A. R. Josephs*, for defendant and opponent.

By the court:

**EUSTIS, C. J.** On examining those questions presented by the counsel for the plaintiff, we have been unable to come to any other conclusions than those adopted by the district judge in his written opinion. For the reasons given by him, the judgments is affirmed, with costs.

**Kennedy, J.** "This case turns upon the question of the validity of the pledge of the bathing establishment. Article 3109 of the La. Code declares, that a debtor may give in pledge whatever belongs to him. Article 3119, declares that it is essential to the contract of pledge, that the thing pledged be actually delivered to the pledgee. But article 3120, modifies the preceding article by saying, that this delivery (meaning of course the actual delivery) is only necessary with respect to corporeal things; and that as to incorporeal rights, such as debts, the delivery is merely fictitious and symbolical. My understanding of these articles is, that a debtor may pledge whatever movable property belongs to him, provided it be susceptible of a delivery either actual, fictitious or symbolical; but that a thing which is susceptible of neither of those kinds of delivery, is not susceptible of being pledged. I am further of opinion, that the bare agreement of the parties is not equivalent in any case to a fictitious or symbolical delivery within the meaning of article 3120. In the case at bar, there was no actual delivery, and no delivery is relied upon except that which, it is contended, results from the notarial agreement of the parties and the recording of that agreement in the conveyance office. I consider the recording in the conveyance office as amounting to nothing. I believe a legal delivery might have been effected by an instrument in the form of a sale or transfer, of all *Kirwan's* right to *Caffin* for the avowed purpose of securing him by way of pledge, accompanied by a notice to *Kirwan's* lessor. This would have vested the legal title into the pledge. Every day our courts give the effect of a mortgage to contracts of this description passed in other States. But, one thing appears to me certain, namely: that if the delivery of rights under a lease cannot be effected in this manner, it cannot be effected at all, and consequently that such rights cannot be pledged by our law."

Injunction perpetuated, with costs.

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THOMAS J. COLLEY v. SUCCESSION OF JOHN LATOURETTE.

The plea of prescription is not inconsistent with the admission that the debt was once due, nor with the plea of payment and compensation.

In an action for services rendered, to which there is a plea of prescription, it is no defence to the plea to show, that a part of the services were rendered within the prescriptible term.

**A**PPEAL from the Second District Court of New Orleans, *Lea, J. Dufour*, for plaintiff. *Bryne*, for defendant. By the court :

**PRESTON, J.** *Latourette* was a maker and vendor of maps. The plaintiff was employed by him, at intervals, from January, 1846, until July, 1849, in traveling with and for him, throughout this State, in procuring information for his maps, getting subscribers and selling the maps, collecting money, and other services. His employments were much the aspect of agencies ; but the district court, the counsel of the parties, and the witness to his original employment, have regarded him as a clerk, and we see no sufficient reason to take a different view of his employment.

He was employed at the rate of thirty-five dollars a month, his expenses to be paid, and sues for wages during the whole term from his engagement, until the death of *Latourette*, admitting, on the trial, credits to the amount of four hundred and twenty dollars.

The prescription of three years, under the 3503d article of the code, is plead by the defendant, against the claim of the plaintiff, for services previously to the 16th of September, 1848, being three years before the institution of this suit. The plaintiff contends that the plea cannot prevail, because his services were admitted in the original answer, and payment and compensation plead against them. The plea of prescription is not inconsistent with the admission, that the debt was once due, nor with the plea of payment and compensation. On the contrary, it supposes a debt to have existed, and that it has been extinguished by payment, compensation, or otherwise.

It is next contended, that the claim for services is not prescribed, because they were continued until within less than three years before the institution of the suit. But the contrary was expressly decided by the late Supreme Court in several cases. 5 L. R. 15. 6 N. S. 226. 14 L. R. 553. And in the last case arising under the article of the code invoked in this case, the judgment of the court was fortified by such cogent reasons as to command our unqualified approbation.

We think the district court made a reasonable allowance to the plaintiff, for his services, according to the proof in the record.

The judgment appealed from is affirmed, with costs.

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SHULTZ AND HADDEN v. J. W. PAYNE.

Where an undated bill, endorsed for accommodation of drawer, and, to enable him to use it in trade, has been deposited as collateral security, the law does not fix its date at the time of its delivery, but the holder may fix it at the time when, according to agreement, he is entitled to use the bill.

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v.  
PAYNE.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Wolfe and Singleton*, for plaintiffs. The mere fact that *Payne* intrusted *Lamme* with the bills, without date, was a full authorization to him to fill the blanks with any date he pleased, and the plaintiffs enjoyed the same right.

"If endorers commit a promissory note to the maker, with a blank for the date, they thereby authorize him to fill the blank with what date he pleases." See *Mitchell v. Culver*, 7 Cowen R. 336. *Mechanics and Farmers' Bank v. Schuyler*, 7 Cowen, 337.

The case then narrows itself down to this: *Payne* endorsed *Lamme's* bills, and *Lamme* goes into the market and negotiates them, for his own uses. It being known that *Payne* was a wealthy man, his name in *Lamme's* hands was equal to so much cash; he thereby obtained a credit he did not otherwise enjoy. Will the Supreme Court of our State say, that, in the commercial community of New Orleans, a person, under these circumstances, can repudiate his name and his obligation? We say, no. The judge of the district court thought, that when a merchant endorses a bill of exchange, and put it upon the market, he should pay it, when legally notified of its dishonor.

*Benjamin and Micou*, for defendant. These bills were delivered to the plaintiffs in May. At that time the plaintiffs gave value in credits to *Lamme*, and became, according to the usages of commerce, the holders and owners of the bills. But, it is the well settled principle of law, that the date is not essential to the validity of a bill or note, and that, in the absence of a date, the date of issue may be proved *aliunde*, and that date is regarded as the date of the bill. *Smith's Mercantile Law*, 171. Story on Notes, § 45. Chitty on bills, 148, 10th Am. ed. Story on Notes, 186, 195.

The legal effect of the delivery of these bills to the plaintiffs, on the — May, was, therefore, to give them that date. From the moment of their delivery the obligation of the defendant became fixed and complete, and the bills, from mere projects, became valid and binding contracts. Now, let us suppose that the drawer had filled up this date as of the — May, and then altered the term by striking out thirty, and inserting one hundred and twenty days. Can it admit of a doubt that the endorsee would have been released?

But, whether the burthen is made more onerous or not, the endorsee is equally released. He is surety, and may stand upon the letter of his contract. Any alteration in its terms releases him, even if the court should think the alteration made the contract less onerous to the principal. *Roman, Governor, v. Peters*, 2 R. R. 479. *McGuire v. Wooldridge*, 6 R. R. 47. *Theobald on Agency*, 76. *Miller v. Stewart*, 9 Wheat. 680.

By the court:

**EUSTIS, C. J.** The defendant is sued as endorser on certain bills of exchange. Judgment was rendered against him for the sum of \$4941, with interest and damages, being the balance due on them to the plaintiffs. From this judgment the defendant has appealed.

The plaintiffs, merchants in New Orleans, are the holders of the bills for a valuable consideration, having received them as a security against loss, by reason of advances made by them on certain shipments or purchases to be made by *D. L. Lamme*, and consigned to their friends in Cincinnati. The plaintiffs, having taken these bills in the usual course of business, it is indifferent to their rights whether the defendant was an accommodation endorser or not. The endorsement of *Payne*, we must presume, was for the purpose of giving credit to the bills, and to enable the drawer to use them for any lawful purpose of trade. There is no evidence, relative to the endorsement, as of any circumstances under which it was given. *Vide Matthews, Finley & Co. v. Rutherford*, 7th Ann. 225.

The bills were on the drawer's house, in St. Louis. *Lamme* was the drawer, acceptor, and payee of the bills, which were without date. They were drawn in New Orleans, and handed to the plaintiffs in May last.

In August, when the result of the transactions between the plaintiffs and *Lamme* was ascertained by the returns to the shipments, the plaintiffs' clerk

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called on the defendant to fill up the dates. On his refusal, the clerk, having communicated to the defendant the result of the accounts between the parties, and of the necessity of using the bills, filled up the blank of the dates with the 26th of August. The bills were forwarded to St. Louis, and returned under protest, of which the defendant had notice.

It is contended that the delivery of the bills to the plaintiffs, on the 5th of May, gave them that date, and, they being payable at thirty days after date, the dating them subsequently in August released the endorser.

The right of the plaintiffs to give the bills what date they pleased, cannot be contested. They bound themselves not to use the bills except to meet their own acceptances in favor of *Lamme*, which the bills were given to secure. When the necessity for their being negotiated arose, it was a proper time to affix the dates to the bills.

The judgment of the district court is affirmed, with costs.

### THE STATE OF LOUISIANA v. GEORGE EOCHART.

The change in the name of the court merely, does not change its powers, or the modes of proceeding prescribed by law. Therefore, where the jurisdiction of the criminal court over the limits of the present Third District, was transferred to the Third District Court of the State, with it were necessarily transferred the modes of prosecution prescribed by law for the criminal court.

**A** PPEAL from the court of the Third Judicial District, *J. Calvitt Clarke, J. Johnson*, Attorney General, for the State. *Walker & De France* for the accused. By the court:

PRESTON, J. The prisoner has been prosecuted by an information filed against him in the Third District Court of the State, for larceny, and receiving stolen goods, knowing them to be stolen. He was convicted of the last mentioned offence, and sentenced to one year's imprisonment at hard labor in the penitentiary. His counsel contends that the district attorney had no power to prosecute him for that offence by information.

Previous to the adoption of the present Constitution, the Third District was embraced within the jurisdiction of the Criminal Court of the First District of the State. And it was provided by an act, approved the 8th of March, 1841, "That in all criminal prosecutions in the Criminal Court of the First District, for crimes and offences punishable by not more than two years' hard labor, the proceedings may be by information," p. 59.

Under the Constitution of the State, the jurisdiction of the Criminal Court over the limits of the present Third District, was transferred to the Third District Court of the State, and with it, necessarily, the modes of prosecution prescribed by law for the criminal court. This was expressly decided by this court, in the case of *The State v. McClane*, 4th Ann. 435.

The change in the name of the court merely, does not change its powers, or the modes of proceeding prescribed by law.

The judgment of the district court is affirmed, with costs.

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## MATTHEWS, FINLEY &amp; CO. v. C. M. RUTHERFORD.

The accommodation party to a note, holds himself out to the public, by his signature, as absolutely bound to every person who shall take the note for value, to the same extent as if that value were personally advanced to himself, or at his request. Nor is it any defence that the party who takes the note, knows it to be accommodation paper, if, before it becomes due, he takes it *bonâ fide* and for value.

An accommodation party to a note, who authorizes the holder to sell, cannot resist payment on the ground that he pledged it.

A notarial act of pledge, or a written act registered in a notary's office, is a formality which is necessary to protect the payee against third parties; but its omission is unimportant as between pledgor and pledgee.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge*, J. *Samuel R. Walker*, for plaintiff, cited Chitty on Bills, 334. *Nisbet v. Galbraith*, 3 Ann. 692.

*E. R. Olcott*, for defendant. Where negotiable notes are delivered as security for a debt, and no authentic act is made to evidence the pledge, they will not confer a preference in case of insolvency. 2 L. R. 361 and 386. "It is not every endorsement and deposit of a note as collateral security that transfers such absolute property, as will deprive the payee or depositor of all right, and the maker of every defence he may have against it previous to the notice of deposit or pledge." *Lapice v. Clifton*, 17 L. R. 157.

By the court:

**SLIDELL, J.** This suit is brought upon a note dated in April, 1851, at eight months, for \$1980, made by the defendant, to the order of *S. B. Conrey*, and by him endorsed in blank. The answer contains a general denial, and also pleads that the plaintiffs are not the owners of the note, but merely hold it as collateral security for debts due them by the payee; that *Conrey* gave the defendant no value for it; that no legal transfer was ever made to plaintiffs; that they gave no value for it, &c.

There was judgment for the defendant, and the plaintiffs have appealed.

From the testimony of *Conrey*, a witness offered by the defendant, it appears that the defendant gave *Conrey* this, with other accommodation notes, amounting to between nine and ten thousand dollars. "The arrangement between witness and *Rutherford* was, that he, the witness, could raise money on those accommodation notes. The agreement between witness and *Rutherford* was, that witness should take the notes." In May or June, 1851, *Conrey* applied to the plaintiffs for a loan of \$4500, which they made upon his giving them the defendant's notes, as collateral security, for the payment of the money at the time stipulated, which was about twenty days. No act of pledge was made. It does not appear that the plaintiffs knew the notes were accommodation notes; and *Conrey* says he thinks they were not aware of it. He has repaid them \$1500, and a balance of \$3000 is still due.

In support of the judgment of the court below, the appellee relies on the following cases: *Coddington v. Bay*, 20 Johnson, 637. *Rosa v. Brotherson*, 10 Wendell, 86. *Smith v. Van Loan*, 16 Wendell, 662. *Thompson v. Hule*, 6 Pick. 260.

**MATTHEWS** Every one of those cases will, upon examination, be found to differ from the  
**v.** present in the attendant circumstances, and to involve *arguendo* doctrines, which  
**RUTHERFORD.** support, instead of invalidating, the claim of the plaintiffs.

In *Coddington v. Bay*, the case was this: *Randolph* and *Savage* were employed by *Bay* to sell a ship for him, on credit, and transmit him the purchaser's notes. Instead of doing so they, becoming insolvent, gave the notes to *Messrs. Coddington*, as security against responsibilities they were already under, as endorsers of notes of *Randolph* and *Savage*, and makers of notes lent to *R.* and *S.* for their accommodation. The rights of *Bay*, the true owner, were considered superior to those of the *Messrs. Coddington*, mainly upon the ground that they gave no new consideration for them, nor parted with any security as an inducement for their being delivered. But the doctrine was distinctly recognized by all the judges, that a holder who has in the usual course of business and in good faith parted with his money, or his property, at the time of receiving the note and upon its credit, is entitled to protection, and the real owner must bear the loss.

In *Rosa v. Brotherson* the case was this: *Brotherson* was sued upon a note of \$100, at nine months, payable to the order of *McClelland*, and endorsed by him, before maturity, to *Rosa*, with the understanding that he should apply \$55 of its amount to pay himself a debt already due to him by *McClelland*, and the balance to pay another creditor of *McC.* But, before the note was given to *Rosa*, an arrangement had been made between *Brotherson* and *McClelland*, by which the note was satisfied, and was to be given up. It was, therefore, fraudulently put into circulation against the express agreement of the parties. It was held, that as the plaintiff had not paid value, nor parted with any thing at the time of the transfer of the note, thus fraudulently put into circulation, he had no equity superior to that of the makers. He loses nothing, said the court, "if the defendant succeeds in his defence. He gave nothing for the note, advanced nothing, nor incurred any responsibility upon its credit." But the court, at the same time, distinctly recognized the doctrine, that where negotiable paper is transferred in the usual course of business, for a valuable consideration and without notice of fraud, the right of the holder must prevail.

The case of *Smith v. Van Loan*, establishes nothing which favors the defence in this cause; and contains, on the contrary, dicta which, by implication, are adverse to the defendant.

In *Thompson v. Hall*, the plaintiff took the note, which was payable on demand in six months after it was due, and under circumstances which might reasonably excite suspicion that it was affected by equities. The fact that it was taken as collateral security, was not the controlling ground of the nonsuit.

None of these cases cover the one before us. They and others, which the defendants have referred to or which may be found in the reports, at most, go to this extent, that a note, taken as collateral security for a preëxisting debt, without any new consideration whatever, will be held subject to equities between the contending parties; a doctrine which, even thus restricted, has not commanded universal concurrence. See 16 Peters, 1, *Swift v. Tyson*. But, on the other hand, the reports and commentators abound in authorities to the effect that the *bond fide* holder will be protected against such equities, when he has taken the note as security for advances made upon its credit. Such a case falls within the scope of the general principle of commercial law, which protects the *bond fide* holders, for a valuable consideration, of negotiable paper; for the term



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value has a very large and liberal import. The principle is jealously guarded in England and in the United States, from considerations of public policy in furtherance of the convenience and security of commercial dealings. And this policy is consonant with justice. It rests upon the same basis as the doctrine of courts of equity in other cases, where the purchaser has obtained the legal title without notice of the equitable right of a third person to the property. The only difference in the commercial law, between the absolute holder for value, and the party who takes the note as collateral security for money advanced, so far as the right of recourse against the maker is concerned, seems to be this: that the former may recover in full, and the latter, if there be equities, is restricted to the extent of his advances. In other words, he is considered as a *bond fide* purchaser *pro tanto*. See *Stulkr v. McDonald*, 6 Hill, 95, and cases there cited.

But, if, under such circumstances, the equity of the maker must yield to the equity of the holder, although the consideration of the note may have failed, or the maker may have a just setoff against the payee, or the note may have been paid, &c., is the case of an accommodation maker to be viewed more favorably? Such is the case here, and when the true nature of the contract, in its origin, is properly appreciated, all pretence of a defence, under the commercial law, disappears.

The very object of an accommodation note is to enable the payee, by a sale or other negotiation of it, to obtain a credit with third persons for its amount. The party, says a learned author, hold himself out to the public, by his signature, as absolutely bound to every person who shall take the same for value, to the same extent as if that value were personally advanced to himself or at his request. Story on Notes, § 194. See also *Smith v. Knox*, 3 Est. 46. Chitty, 91.

Hence, it is no defence that the note was known to the holder to be an accommodation note, if he takes it for value, *bond fide*, before it becomes due. If, however, an accommodation note had been given for a special object, which was abandoned, and afterwards, in fraud of the maker to whom it should have been given up, it is negotiated, and the endorsee knows or has reason to believe such fraud, his dishonest participation in its commission would bar his recovery; and this only is the extent of the suggestion in *Smith v. Van Loan*.

The defendant has surely subjected himself to the fullest scope of the doctrine above enunciated by Mr. Justice Story. For his witness, the payee, says unqualifiedly, "the arrangement between witness and *Rutherford* was, that he, the witness, could raise money on these accommodation notes." In the face of this agreement, to say that although *Rutherford* would have been bound if the payee had sold the notes outright, he is not bound when the payee raises money by pledging them, is a refinement which we cannot understand; and which is certainly in direct conflict with authority. He who has the property has a disposing power. See *Collins v. Martin*, 1 Bos. and P. 650. *Bosanquet v. Dudman*, 1 Stark, 1. *Atwood v. Crowdie*, 1 Stark, 483. *Brywood v. Watson*, 4 Bing. 496, cited Chitty note p. 85. *Williams v. Smith*, 2 Hill, 301. *Bacruiter v. Priest*, 12 Pick. 406. Story on Notes, § 195. Chitty, 85. Byles, 62.

The only other question presented by the defendant is, whether the pledge to the plaintiffs is unavailing against the defendant, because it was made without the form prescribed in the 3125th article of the Civil Code.

We are of opinion that a notarial act of pledge, or a written act registered in a notary's office, is a formality which is necessary to protect the pledgee against third persons. But its omission is unimportant as between the pledgor and pledgee, and is not available to the defendant, who stands in the attitude of a

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person who has voluntarily clothed the pledgor with the ostensible ownership of the thing pledged, and this for the very purpose of enabling him to raise money upon it.

The purpose of the law in requiring an act of pledge before a notary, describing the thing pledged, its amount, number, weight, measure, &c., was to prevent frauds upon creditors. The date of the contract was thus made certain, and a change of valuable goods for others of inferior value prevented. Without such precautions an unfaithful debtor, on the eve of proceedings which would put his property in the custody of the law, might collude with others or withdraw it from their pursuit, or give unjust preferences by instruments ante-dated. Experience, however, has shown that the expensive and troublesome formality of a notarial act was a clog upon commerce, the movement of which should be rapid and free, and our Legislature has lately abrogated it.\* But, between the contracting parties, a notarial act never was necessary. This contract is open to proof by ordinary evidence. See Pothier, Nantissement, No. 17. Troplong 108, *et seq.*

It is therefore decreed, that the judgment of the district court be reversed and that the plaintiffs recover of the defendant the sum of \$1980, with interest from 15th December, 1851, until paid, and costs in both courts, together with \$2 50 costs of protest.

**B. F. DAVEGA & Co. v. CRESCENT MUTUAL INSURANCE COMPANY OF NEW ORLEANS.**

A policy of insurance may be reformed, where it is demonstrated, by legal and exact evidence, that there has been a mistake in filling it up, which has violated the understanding of both parties. But the petition must show, by clear and unequivocal allegations, that there was, before the policy was framed, an agreement, a concurrence of the minds of assured and underwriter to protect risks, which were afterwards, by the mistake or fraud of the underwriters, left out of the formal instrument, or else it will be defective, and proof to reform the policy, or vary the risks, will be rejected.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. C. Roselius and Miles Taylor*, for plaintiff. Was the evidence properly rejected? We contend that it was not, on the authority chiefly of the case of *Tracy v. Theyer et al.*, 7 N. S. 355, 356, and of *Adams v. His Creditors*, 14 L. R. 463.

*John R. Grymes and M. M. Cohen*, for defendant. The authorities are now clear, that parol evidence cannot be given to vary the terms of the written contract where there is no ambiguity in the contract itself, and there is none in the policy sued on. 1 Arnould, 65, 79. *Truman v. Loder*, 11 Ad. & El. 589, 39 Eng. Com. Law Rep. *Yates v. Pym*, 6 Taunt. 446, 1 E. C. L. R. 1 Hall's S. C. R. 632. 10 Metcalf, 216. 2 Denio, 75. 1 Sanford, 132. 1 Greenleaf, § 292. 3 Kent's Com. p. 260. 3 Mason, 6. 2 Sumner, 567. *Ib.* 327. 1 Emerigon.

By the court :

**SLIDELL, J.** The plaintiffs claim payment for goods destroyed by fire at San Francisco, on the 4th May, 1850. The policy of insurance states that it insures *David C. Labatt*, for account of *B. F. Davega & Co.*, against loss or damage by fire, to the amount of \$5000, for one year, on merchandise, being stock in trade, consisting of dry goods and clothing, contained in the wooden building,

\*Acts of 1853, p. 15. R.

situate on Kearney street, fronting the public square in San Francisco, occupied by *D. F. Davega & Co.* The blanks, in the usual printed clause, are filled up, so as to protect the assured for such loss as shall happen by fire to the property insured during twelve months, to wit, from the 6th day of May, 1850, unto the 6th day of May, 1851.

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v.  
CRESCENT  
MUTUAL INSU-  
RANCE CO.

There was judgment, as in case of nonsuit, in the court below, and the plaintiffs have appealed.

We are inclined to the opinion that there was error in rejecting the letter and plan offered in evidence by the plaintiff, upon the particular ground adopted by the district judge. But, it is not probable that any useful end would be attained in remanding the cause for a new trial, entertaining, as we do, the opinion, that the petition is loose and defective in its averments, not exhibiting with legal accuracy and clearness, a cause of action, nor duly enunciating matters of fact, which, it is shown by suggestions contained in the bill of exceptions, the plaintiffs intended to rely upon.

We do not doubt that a policy of insurance may be reformed, where it is demonstrated, by legal and exact evidence, that there has been a mistake in filling it up, which has violated the understanding of both parties.

But, a petition for such relief should set forth by distinct and direct averments, not only that the petitioner contemplated a different protection from that expressed in the policy, but that his wishes were communicated with reasonable certainty to the underwriters, and were by him also understood and assented to, and that the subsequent failure to embody them in the policy was the result of fraud or mistake on the part of the underwriter. There must be a distinct showing by clear and unequivocal allegations, [not as in this case argumentatively, and by ambiguous inference] that there was before the policy was framed an agreement, a concurrence of the minds of the assured (or his agent) and the underwriter to protect risks, which were afterwards, by the mistake or fraud of the underwriter, left out of the formal instrument.

The judgment of the district court leaves the plaintiffs the right to bring another action, and for the reasons above stated, it is affirmed, with costs.

### EMILE D. BARON v. THOMAS PLACIDE.

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The fact that one party to a contract through complaisance, and at the request of the other party, rendered a service, cannot raise a presumption against the former, that she thought herself bound by the contract to render it.

Where the contract provides a penalty for its breach, and points out the manner in which it is to be dissolved, a dissolution of it in a manner not pointed out, is a breach, and the penalty is thereby incurred.

Where a contract has been partly executed and justice requires it, the court will modify the penalty.

**A** PPEAL from the Third District Court of New Orleans, *Kennedy J. Eyma* and *Grailhe*, for plaintiff. *Benjamin and Micou* and *T. H. Howard*, for defendant. By the court:

Rost, J. This case presents the grave question, whether the plaintiff was bound under her engagement as *danseuse* and *mime* at the theatre of the Varieties, to dance the polka, in the comedy entitled the *Serious Family*, when required to do so by the stage manager.

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Her engagement was as *seconde premiere danseuse*, and had been entered into in Paris. It is considered that she is a *chef d'emploi*, and she urges that she would not as such be bound to dance parlor dances in parlor dress, with the figurants of the company, as required of her in this case; but in the act signed by her in Paris, after the stipulation by which she binds herself to discharge all the duties of *seconde premiere danseuse*, the following printed clause is found: "Ainsi que tous les rôles portés sur son repertoire, sous peine de résiliation et de restitution des avances et voyages, s'il ne les joue en vingt-quatre heures, sur un simple raccord: le tout en chef ou partage, à l'option de l'Entreprise, qui se réserve le droit de distribuer les pieces nouvelles, à son choix, sans avoir égard aux distributions de Paris, dans lesquelles j'apprendrai quarante lignes ou portées par jour."

The defendant contends, that she is bound, under this general obligation, to play any part that she is capable of playing; that she so understood and executed her engagement originally and danced many times in the same play, without making any objection, and that she cannot now be permitted to avail herself of an interpretation, different from that which she herself put upon the contract during more than twelve months.

It is further urged, that even under her engagement as *premiere seconde danseuse*, she was bound to fill any part assigned to her in her profession as a dancer *dans son emploi*, and that whether she danced in a comedy or ballet in long dress or short dress, she was *dans son emploi*.

It is proved by unimpeached evidence, that the printed part of the contract is a clause of style applicable to actors and singers, and not to dancers. The defendant objected to this evidence on various grounds, but we think it was properly received. The printed clause when applied to a dancing girl, if not absurd, is at least ambiguous, and as whatever is ambiguous in contracts should be determined according to the usage of the country where they are made, we perceive no valid objection to the evidence adduced to prove the usage of France in contracts of this description. Civil Code, 1948.

The printed clause may well be said to be technical, and this evidence was necessary to enable the court to interpret according to its received meaning, with those who profess the art to which it applies. Civil Code, art. 1942. There is another consideration which authorized the introduction of the evidence excepted to. It is stated in the act, that it is temporary, and is to be exchanged on the arrival of the plaintiff in New Orleans for another, *semblable a celui des articles de la troupe*, clause d'entretet et d'emploi toute fois, *strictement conservée*.

So that, besides her obligations as *premiere seconde danseuse*, there was nothing in the contract definitely binding, and evidence was admissible to show that under the usage in France, the printed clause could not have been intended to form part of her final engagement.

We think the second ground equally untenable. Her *emploi* was that of *premiere seconde danseuse*, and she could not be required to appear in any dances which did not enter into that *emploi*, according to the usages of the theatre. See 12 Dalloz, p. 635, § 24. *Kelly v. Caldwell*, 4 N. S. 38.

It is said that the plaintiff has herself put upon the contract, the interpretation for which the defendant contends; it appears to us, on the contrary, that the defendant has acquiesced in the construction upon which the plaintiff insists. The engagement of *Hilaeriot*, the *premiere danseuse*, was identical with that of the

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plaintiff. She was called upon to dance in the *Serious Family*, and peremptorily refused. The defendant, though vexed at her refusal, appears to have submitted to it as a matter of right. The plaintiff appeared in that piece several times, but the director of the *corps de ballet* has testified, that she did so through complaisance, and at the request of the defendant who asked it as a favor; her appearance under those circumstances cannot prejudice her legal rights.

We concur with our learned brother of the district court, that the refusal of the plaintiff to dance a parlor dance, in parlor dress, with the figurants of the theatre, constituted no just ground of dismissal, but we have been unable to concur with him in the measure of damages he has adopted. The defendant had a right under the contract to dismiss her, without cause, after giving two months' notice; and as he was at liberty to dispense with her services during those two months, provided he paid her the stipulated salary, the district judge was of opinion, that she could only recover two months' salary, over and above the arrears due her, at the time of the dismissal.

In this we think there is error; the contract contains a clause that the party who commits a breach of it, shall incur a penalty of fifteen thousand francs towards the other, and the present action is for that penalty. The interpretation of the district judge obliterates the penalty in all cases in favor of the defendant, while it leaves it in full force against the plaintiff. The contract should receive such a construction as will give effect to every portion of it, and preserve equality of rights between the parties. The defendant had it in his power to put an end to the contract, by giving two months' previous notice, but he should have given that notice, and tendered the arrears due and two months' salary, if he intended to dispense with her services from the day the notice was given. Instead of this, he dismissed her abruptly, without making a tender and without a just cause. The breach of contract is precisely that contemplated by the clause imposing the penalty.

At the time of the breach, nearly two-thirds of the time during which the engagement was to continue had expired, and as article 2123 of the Code, authorizes us to modify the penalty when the contract has been partly executed, we deem it just to reduce it in this case, so as to allow the plaintiff eight hundred dollars in full of all her claims. This is the amount she would have been enabled to recover, if she had sued for her salary during the unexpired term of her engagement.

The judgment must therefore be amended in her favor as prayed for.

It is ordered, that the judgment in this case be amended, and that the plaintiff recover of the defendant, the sum of eight hundred dollars. It is further ordered, that the judgment as amended, be affirmed, with costs.

Defendant applied for a re-hearing, which was refused.

## UNION BANK OF LOUISIANA v. THE EXECUTORS OF JOHN McDONOGH.

Creditors of a succession ought not to be delayed, after the brief interval prescribed by the law for the payment of their claim, on the ground that the interest of legatees would be benefited by doing so. On the application of a creditor who is unnecessarily delayed, the court will order a sale of property to pay the debt.

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OF LOUISIANA  
v.  
McDONOGH.

By the Court: As the estate is admitted on all hands to be enormously rich, there seems no objection to providing for the payment of this particular creditor, without directing the usual formality of a tableau of distribution.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. H. R. Denis*, for the plaintiff. *Pierce and Grivot*, for defendant. By the court: **SLIDELL, J.** The district judge has given at length his reasons for refusing in part an order asked by the Union Bank, which corporation holds a note of *McDonogh* for \$50,000, protested for non-payment on the 4th January, 1852. The application was for an order to the executors to sell for cash movable effects of the succession to a sufficient amount to pay the said claim. The decree ordered the sale of certain movables in the Orleans Theatre, which were subject to the vendor's privilege in favor of the bank for this debt, and also of certain other movables specified in the decree; and also of certain real estate specially mortgaged to secure the payment of the note, but discharged the note so far as it asked any further sale.

The duty of a living man is to pay his debts before making donations; and the same principle of justice applies in the administration of a dead man's estate.

His debts take precedence of his legacies, be those legacies valid or invalid; and his creditors ought not to be delayed after the brief interval prescribed by the law, because the interests of legatees may be benefited by so doing. *A fortiori*, should there be no delay for the sake of the supposed interests of legatees, whose rights are in litigation and undecided.

While we do not think proper, under the circumstances of the case, to disturb the order of the district judge, so far as it commands the property mentioned in the decree to be first sold, and so pay as far as it will go the debt due to the plaintiffs, we at the same time think that by reason of the acknowledged insufficiency of that property to pay the whole debt, and the right of the creditor to a prompt satisfaction of a debt matured, the district judge should have gone further and made a simultaneous provision to pay the plaintiffs in full. This provision we feel bound to make by an amendment of the decree. C. C. 1661.

It is proper to add, that as the estate is admitted on all hands to be enormously rich, there seems no objection to providing for the payment of the particular creditors, without directing the usual formality of a tableau of distribution, &c. The bank is the only creditor before us who presses for payment. We do not consider ourselves called upon, as the matter is presented and as no answer to the appeal has been filed by the appellees, to notice any other claims. When other creditors choose to act, the court below is open for their relief. We do not doubt but that the district judge, in accordance with the views we have expressed, will promptly accord it. There may be creditors who are satisfied with the interest their debts are drawing, and prefer to let them stand.

It is therefore decreed, that the judgment of the court below be so amended, as that the said executors do cause to be forthwith advertised for public sale the bonds of Municipality Number One, mentioned in the inventory; said sale to be advertised to take place on the day following the sale of the property described in the decree appealed from; and that on said above first named day, the executors do cause to be sold so many only of said bonds as may be necessary to meet said claim of the Union Bank, incurred by such previous sale, whether by reason of an insufficiency of the proceeds of said previous sale, or by reason of said previous sale being, in whole or in part, from any unforeseen or lawful cause not effected on said day. And it is further decreed, that the cost of the appeal be paid by the succession.

## ELIZA FLUHART v. JAMES GOLDING et al.

7a 233  
46 430

**A** PPEAL from the First District Court of New Orleans, *Larue, J. J. H. Holland*, for plaintiff. *Randel Hunt* and *J. W. Frost*, for defendant. By the court:

**EUSTIS, C. J.** The judgment having been executed by the defendant at the instance of plaintiff, the appeal must be held to be abandoned. 3 Ann. 115. Code of Practice, 567.

Appeal dismissed, with costs.

## THE TOWN OF CARROLLTON v. W. JONES AND WIFE.

7b 233  
46 1411

Towns and cities may be projected, and streets, public squares and roads, may be laid out on plans; but so long as the ground remains enclosed and no portion of it is sold with reference to those plans, and no express dedication is made and accepted by the proper authority, the right of the owner to the soil which those streets, public squares and roads cover, is not affected thereby.

No particular form of words is necessary to effect a dedication to public use; but to render it binding, it is necessary not only that there be some act of dedication on the part of the owner, but there must also be something equivalent to an acceptance on the part of the public. In analogy to other contracts, the concurrence of two parties is necessary to pass the right.

When neither the dedication nor the acceptance are express, the rights claimed in behalf of the public, must be supported by long continued usage.

**A** PPEAL from the District Court of the Third Judicial District, *J. Calvitt Clarke, J. Roselius*, for plaintiffs. *Beecher*, for defendants. By the court:

**ROST, J.** The plaintiffs, a municipal corporation, complain that the defendants have obstructed and closed up certain streets in the town of Carrollton, and seek to have the streets opened and the obstructions removed. They also claim damages.

The answer of the defendants is a general denial, and they have appealed from the judgment rendered against them in the district court.

The town of Carrollton was originally laid out in lots of sufficient size for gardens and small rural estates. The defendants are now in possession of a portion of one of those lots, measuring 215 feet 7 inches front on Levee street, by a depth of over 1200 feet. It is proved, that previous to the year 1837, and ever since that time, this lot has been surrounded with a close fence, and cultivated as a field, and that no part of it has at any time been thrown open to the public use.

The proprietors of the remaining portion of this lot and of the adjoining lots, have found it to their advantage to divide their land into building lots, by running streets through them, and the streets, mentioned in the petition, have thus been opened in their whole length, except through the ground of the defendants.

The plaintiffs insist that the defendants and those under whom they claim, have long since dedicated to the public the soil over which these streets pass, by various plans and conveyances made with reference to said plans.

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The first plan to which they refer, is that made by *Benjamin Buisson*, surveyor of the parish of Jefferson, deposited in the office of *H. B. Cenas*, notary public, by *Mrs. Brewer* and others, who subsequently caused the property to be sold according to said plan; at which sale the defendant, *William Jones*, purchased one of the lots.

In the plan referred to, the streets claimed are not represented as running through the land of the defendants. They stop at their lower line, and only run through the remainder of the original lot of which they own a part. The fact that *William Jones* recognized the existence of those streets within the limits of the plan, cannot be taken as proof of dedication on his part.

The plaintiffs' counsel has referred us to another plan, which the defendants caused to be made by *John Schreiber* on the 15th March, 1836, on which all the streets claimed are laid off and figured. They allege that the defendants have made various sales of property with express reference to said plans, and, among others, a sale of six lots to *Stephen A. Sharp*, on or about the 11th January, 1836. They also show a special mortgage granted by the defendants to the New Orleans and Carrollton Railroad Company, in which the property is mortgaged by town lots, according to the division made in the plan of *Schreiber*.

The sale to *Sharp* could not have been made with reference to the plan of *Schreiber*, which bears date more than two months subsequent to it, and we have already stated that *Buisson's* plan was no evidence of dedication by the defendants.

It is true, that in the plan of *Schreiber*, the streets claimed are laid out and recognized, and that the defendants mortgaged the property to the New Orleans and Carrollton Railroad Company according to that plan. Whatever right a mortgage thus made might have given to the company, if the loan made by them had not been paid, we are unable to perceive that, unattended as it is by possession in the public, it can confer any upon the plaintiffs. Towns and cities may be projected, and streets, public squares and roads, may be laid out on plans; but so long as the ground remains enclosed and no portion of it is sold with reference to those plans, and no express dedication is made and accepted by the proper authority, the right of the owner to the soil which those streets, public squares and roads cover, is not affected thereby.

We admit that no particular form of words is necessary to effect a dedication. But it is indispensable that the owner shall clearly manifest an intention to dedicate the land to public use, and that the public should, relying upon that manifestation, have entered into the use and occupation of it in such a manner, as renders it unjust and injurious to reclaim it.

To render a dedication to public use binding, it is necessary not only that there be some act of dedication on the part of the owner, but there must also be something equivalent to an acceptance on the part of the public; in analogy to other contracts, the concurrence of two parties is necessary to pass the right. *State v. Trask*, 6th Vermont Rep. 355.

When neither the dedication nor the acceptance is express, the rights claimed in behalf of the public must be supported by long continued usage.

There are facts in the record inconsistent with the intention of the defendants to dedicate to public use, some of the streets claimed. About the time the plan was made, upon which this dedication is based, the defendants were building a house, which stands in part, in one of those streets, and in which they have lived ever since.



We are of opinion that the plaintiffs have failed to show the dedication alleged. It is therefore ordered, that the judgment in this case be reversed; and that there be judgment in favor of the defendants, with costs in both courts.

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JONES.

### SAME CASE—ON A RE-HEARING.

EUSTIS, C. J. The object of the present suit, was the extension of certain streets in the town of Carrollton, through the land of the defendants. The decision of the court was against the plaintiffs. A re-hearing was granted, and a further argument has been had.

The land through which the projected streets are sought to be extended, has been enclosed and cultivated since the year 1837. Part of the dwelling house is within the line of the streets. No act of use or occupation on the part of the plaintiffs or the public, has been shown in relation to the space now required for streets.

It appears, that in a sale of part of the land to a person named *Sharp*, the streets were laid out on a plan, according to which the sale was made, and that a mortgage was made, according to a similar plan of the land, in favor of the Carrollton bank. The sale was made in 1837, and the mortgage in 1838.

Whatever rights *Sharp* may have of way or servitude on the land designated as streets, he forbears the exercise of them, and contends that the whole property remain in its present condition. The mortgage creditors did not exercise their rights, and we may assume that the debt is paid.

Neither was this plan ever submitted to the municipal authority for approval or acquiescence.

As the matter stands on the evidence, the plaintiffs are seeking to enforce their claims, not in furtherance of the rights of *Sharp*, but adversely to him.

We think the former judgement is clearly right, and it is accordingly affirmed.

### OAKEY and HAWKINS v. EXECUTORS OF A. GORDON.

7 235  
48 398

Defendant owned the Mexican Gulf Railroad, and also a steamboat which ran from Pearl River to Proctorville, the gulf terminus of the road. At the former point, cotton was shipped to plaintiffs under a bill of lading given by the captain of the boat, binding him to deliver the cotton at the port of New Orleans, unavoidable dangers of the navigation and fire, only excepted. The cotton was transferred from the vessel to the cars and destroyed by fire, issuing from the chimney of the locomotive, *in transit* to New Orleans. The court held, that the contract to carry the cotton was entire, and the exception in the bill of lading against loss by fire, extended as well to loss on the cars as on the boat, and that defendant was not bound for the loss.

**A** PPEAL from the Fourth District Court of New Orleans, *Straubridge, J. Benjamin and Micou*, for plaintiffs. *H. H. Taylor*, for defendants. By the court:

ROST, J. This is a suit to recover from the *Succession of Alexander Gordon*, the value of certain cotton, destroyed by fire on the cars of the Mexican

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Gulf Railway, which is the property of said succession. It seems that *Gordon* and others were the owners of the steamer *M. A. Moore*, habitually running from West Pearl river to Proctorville, at the lake end of the railroad. The cotton in controversy was shipped on the steamer at the former port, and the captain gave bills of lading, binding himself to deliver it at the port of New Orleans. It was landed at the lake end of the railroad, placed on the cars, and, in the transit from that place to New Orleans, destroyed by fire, communicated by sparks issuing from the chimney of the locomotive.

The defence as to all the cotton destroyed but one bale, is, that it was included in a bill of lading which excepted the dangers of fire.

It is urged by the plaintiffs and appellants, that this exception in the bill of lading should be limited to the dangers of fire on board of the steamer; that the perils of the sea and the dangers of fire are found in the same clause of the bill of lading, and should both be considered as having exclusive reference to the sea voyage.

We think there is nothing in the bill of lading to authorize such a limitation to the exception. As was observed by the district judge, the contract to carry the cotton from West Pearl river to the port of New Orleans, for fifty cents a bale, is entire; and, as nothing shows any intention to divide the risk, the clauses and exceptions in the bill of lading must be considered as entire. The transportation, partly by steamer, and partly by railway, was within the usage of trade. It is reasonable to believe that it was in contemplation of the parties, and it might be inferred from the evidence, that the greater risk of fire on the railway was the cause of the exception in the bill of lading. The defendants have the same right to avail themselves of this exception, that the captain of the steamer would have.

One of the bales of cotton destroyed, was included in the bill of lading which did not except the dangers of fire; and, if the fact had been brought to the notice of the district judge on the trial, it is manifest, from his opinion, that he would have given judgment in favor of the plaintiffs for its value; or, if the plaintiffs had made this error in the judgment the ground of an application for a new trial, it is equally clear that the application would have prevailed. But, as neither was done, we think the matter in controversy is not of sufficient amount so authorize a reversal of the judgment. See *Hann v. Graihle*, 2 Ann.

Judgment affirmed.

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#### PAYNE and HARRISON v. SAME.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J.*  
By the court:

ROST, J. This case is identical with that of *Oakey and Hawkins v. The Executors of Gordon*; and, for the reasons therein given, the judgment must be affirmed.

## THOMAS K. PRICE et al. v. C. M. EMERSON.

A note which has been filed in a court of justice by a party litigant in a suit, cannot be seized under execution against a third party who has no apparent title to the property seized.

**A**PPEAL from the Second District Court of New Orleans, *Lea, J. Benjamin and Micou*, for plaintiffs. *Durant and Hornor*, for defendant. By the court :

EUSTIS, C. J. For the reasons given by the district judge in his written opinion on file, this judgment is affirmed, with costs.

Judgment of the District Court:

*Lea, J.* The plaintiff in the rule, holding an execution directed to him, as sheriff of the parish of Orleans, from the Fifth District Court of New Orleans, in the suit entitled *Harrod and Moody v. John McHenry*, seeks to levy upon certain articles deposited in the Second District Court in the suit of *Thomas K. Price et al. v. C. M. Emerson*. The proceeding resorted to is, that of a rule taken on the plaintiffs, *T. K. Price et al.*, to show cause why the notes filed in the above entitled suit, should not be delivered to the sheriff under the order of the court.

The proceeding resorted to in this case is, perhaps, unexceptionable so far as relates to its form. On this point, however, the supreme judicial tribunal of the State, while they have determined that a seizure cannot be made in the hands of the clerk, have abstained from designating any form of proceeding by which notes, deposited in the files of a court, may be made the objects of a seizure in execution. The language of the court is as follows: We are not called upon to point out a mode in which we think promissory notes in suit and on the files of the court, can be seized and sold under art. 642 of the Code of Practice; a rule that we might under our present impressions prescribe, might work badly in practice and produce difficulties which we do not at present foresee.

Upon the authority of this decision, I should be disposed to recognize the validity of the seizure made in this case, and to order the delivery of the notes to the seizing creditors, if the apparent title to the notes was in the defendant in execution; but in fixing a rule of practice which may serve as a precedent in future litigation, so far as relates to proceedings in this court, care should be observed to confine its application in such a manner, as, if possible, not to work badly in practice nor to produce unforeseen difficulties.

If the evidences of debt filed by litigants in courts of justice, for the purpose of enabling them to prosecute their rights, can be thus summarily seized upon, without a trial, or at least without such trial as will suffice to test a question of title by parties apparently without color of title, litigants would be deterred from the prosecution of their claims, not only by the insecurity which would attach to the possession of their property, but by the inconvenience and confusion which would be created by the interference of seizures made at the instance of persons, who might or ought not to be creditors. Such a rule of practice would certainly result in great confusion.

I am not prepared to say that the plaintiff in execution has acquired no rights under the proceeding had herein. It is true, that possession is of the essence of

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a seizure, and it has been frequently held that no valid seizure of tangible property can be made without taking it into possession; but in the absence of express law, and I know of none applicable under our jurisprudence to a case like the one at bar, it might be within the power of the court, in virtue of the equity powers conferred by art. 21 of the Civil Code, to recognize the proceedings as conferring inchoate rights to be established and matured upon proof made under proceedings had by intervention or otherwise. Be this as it may, I know of no instance in which a note, which has been filed in a court of justice by a party litigant in a suit, has ever been seized under execution against a third party defendant, who had no apparent title to the property seized.

The court, having duly considered the rule taken in this case on the 26th November, 1851, by *John L. Lewis*, sheriff, on *Thomas C. Poole*, clerk of this court, for the reasons assigned in the written opinion this day delivered and on file: It is ordered, that the rule taken in this case be dismissed, the plaintiff therein paying the costs incident thereto without prejudice to the rights of *Harrod* and *Moody*, the creditors seizing in execution, if any they have in virtue of this proceeding, to be asserted hereafter, in any subsequent proceeding had herein according to law. It is further ordered, that the clerk of this court do retain the notes filed herein, subject to the further order of the court in the premises.

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7 236  
124 289

### TRASIMOND LANDRY v. DICKSON AND BOYKEN.

Where the citation of a garnishee contained the title of the court, was in the name of the State and under seal of the court, was tested in the name of the judge and signed by a deputy clerk, and directed the garnishee to answer in writing, under oath, the interrogatories annexed to the petition within ten days of the service, otherwise judgment would be entered, &c. It was held to be a sufficient mention of the place where the clerk's office was held, and also a sufficient indication to the garnishee of the place where his answers were to be filed, under the 179th article of the Code of Practice.

Article 252 of the Code of Practice, seems not to require that the citation to a garnishee, is to be precisely in the same form as the ordinary citation to a defendant.

Where there was no palpable and radical defect in the citation, the petition to annul the judgment which had been obtained, should contain an allegation, that the defendant had not been legally cited, otherwise it will not be competent to attack the judgment on that ground.

An objection that French is the vernacular tongue of defendant, and that the petition and citation were in English only, must be plead *in limine litis*.

The 27th article of the Constitution, does not exempt the Lieutenant Governor from the service of civil process.

In proceedings against a garnishee, who has neglected to answer, his neglect is considered in law as a confession, that he has property of the debtor, and neither judgment by default, nor a rule to show cause, is necessary to fix his liability.

**A** PPEAL from the Third District Court of New Orleans, *Kennedy, J. Durant* and *Horner*, for plaintiff. *Stocton* and *Steele*, for defendants. By the court:

**EUSTIS, C. J.** This suit was instituted to annul a judgment rendered in favor of the defendants against the plaintiff, for the sum of \$990 06 and interest, on a garnishee process under an execution issued on a judgment, which the defen-

dants had obtained against *David Meyers*, in the Third District Court of New Orleans. There was judgment for the plaintiff, and the defendants have appealed.

The grounds of the plaintiff, as alleged in his petition, are these, according to the summary in the brief of counsel: 1st. That the domicile of the plaintiff was in the parish of Ascension, and that he was therefore not amenable to the process of the court, or subject in any manner to the writ of *feri facias* or proceedings under it. 2d. Because the petition and citation of garnishment are insufficient and illegal, they being in the English language only, and French being his mother tongue. 3d. Because the judgment was rendered against him without any judgment by default being first taken, or any issue made, or any rule taken against him. 4th. Because the plaintiff was, at the time of the service of the process upon him, the Lieutenant Governor of the State and president of the Senate, and the Senate was then in session, and no process could issue to compel his attendance in court. 5th. Because said judgment was never notified to him in any lawful manner, and, by law, he was entitled to said notice and to an appeal to the Supreme Court ten days after notification. 6th. Because at the time of the service of the garnishee process he owed the defendant, *Meyers*, nothing, and had no property of his. 7th. Because the judgment was unduly and improperly obtained by the attorneys for the plaintiff in the original suit; that the judge of the district court signed the order for the present plaintiff to answer, under oath, the interrogatories to him propounded, under an error in the hurry of business, under a misapprehension of facts, and without the name of the petitioner being inserted in the order; that it was well known to the court and to the attorneys, at the time, that the plaintiff was the Lieutenant Governor, and the Senate was then in session, and that he was in the discharge of his public duties, and was temporarily in New Orleans, where he did not reside; that when the process of the court was attempted to be served upon him, he minutely explained the whole case to the deputy sheriff, who had the process, and satisfied that person that he, the plaintiff, had no property in his hands belonging to *Meyers*, nor was he in any manner indebted to him; and then and there offered to the person representing himself as the sheriff's deputy, to go with him immediately to court and answer the interrogatories; whereupon the deputy sheriff then told him, the plaintiff, that he was perfectly satisfied that the plaintiff had no money or property of any kind belonging to *Meyers*, and was not indebted to him; that it was not worth while for him, the plaintiff, to go down to court and answer the interrogatories, and that he would inform the defendant's attorneys of the facts of the case as represented by the plaintiff, and that these gentlemen would be perfectly satisfied.

The district judge decided the case on grounds not taken by the plaintiff in his petition. He considered the citation in the garnishment as defective in two respects; 1st, that it did not command the garnishee to deliver his answer in the clerk's office; and, 2d, that the citation makes no mention of the place where the clerk's office is held. For these reasons, he annulled the judgment rendered against the present plaintiff.

In the proceedings in garnishment, the judgment creditors filed their petition, in which they alleged, that they believed *Trasimond Landry* had in his possession, property of the debtor, or was indebted to him in an amount exceeding twelve hundred dollars. They ask for process against *Landry* as garnishee, and that, after due proceedings had, the property or debt in the hands of *Landry* may be applied, by judgment of the court, to the satisfaction of the execution in the hands of the sheriff. Interrogatories were annexed to the petition, and the

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judge directed the "garnishee herein named," to answer the interrogatories within the legal delay. The sheriff returned, that he had served a copy of the petition, interrogatories and citation, personally on the plaintiff, on the 8th December, 1843. On the 9th of January, 1849, the garnishee having failed to answer the interrogatories, judgment was rendered against him for the amount due on the execution.

Several executions were issued against *Meyers*, on the judgment against him, without any success. On the 4th December, 1849, an execution was issued against the plaintiff, directed to the sheriff of the parish of Orleans, which was returned at the instance of the attorney of *Dickson* and *Boyken*, and another execution was issued against *Meyers*. On the 2d of March, 1850, an *alias fieri facias* was issued against the plaintiff. Proceedings under this execution were enjoined at the instance of the plaintiff in the present action, and the petitioner asks, that the judgment against him be annulled, and the injunction granted, be made perpetual.

Having thus stated the proceedings, it remains to consider the several grounds presented in the plaintiff's petition, and those on which the judge decided to annul this judgment. To begin with the latter.

The objections to the validity of the citation, are, that it does not command the garnishee to deliver his answer in the office of the clerk of the court; and contains no mention of the place where the clerk's office is held. Both of which are required under the 179th article of the Code of Practice.

The citation in this case contains the title of the court, "Third District Court of New Orleans," and is in the name of the State, and under the seal of the court. It is tested in the name of the judge, and signed by a deputy clerk. It directs the garnishee to answer in writing, under oath, the interrogatories annexed to the petition within ten days of the service, otherwise judgment will be entered, &c.

The citation thus indicating in its title, that the Third District Court is held in New Orleans, and the clerk's office being in point of fact and practice inseparable from it, the objections to its sufficiency seem to us too technical, even supposing that the citation to a garnishee is to be precisely in the same form as the ordinary citation to a defendant, which nevertheless the article 252 of the Code of Practice seems not to require. But the answer given by the counsel for the defendants to these objections is, that they are not presented by the pleadings and cannot be noticed by the court. He refers to *Landry v. L'Eglise*, 3 L. R. 220, and 10 L. R. 169, *Palmer v. Yarborough*.

The annulling of a judgment rendered by a court of competent jurisdiction, is one of the gravest matters in the administration of justice. The code enumerates the causes for which a judgment may be annulled for defects of form. Code of Practice 604 and 605. One of them is, that the defendant has not been legally cited. This not having been alleged in the petition as one of the grounds on which the plaintiff asks to be relieved from this judgment, and it being not a palpable and radical defect, as the citation reads, we think it is not competent for the defendants to insist on the nullity of the judgment on that account.

In the case of *Leeds v. Debays*, 4 R. R. 258, which was an appeal taken from a judgment by default, it was urged in argument on the part of the defendant, that French was his native tongue, and the petition and citation served on him being in the English language only, the judgment by default against him

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ought to be reversed. But the court held, that the right of the defendant, of requiring the petition and citation served on him to be in the French language, was one of those, like domicil, alienage, official exemption, &c., and must be urged in *limine litis* or considered as waived.

This authority disposes of the first, second and fourth grounds for annulling the judgment. In relation to the fourth ground, it may be added, that the 27th article of the Constitution does not exempt the plaintiff, as lieutenant governor, from the service of civil process. It exempts the members of the general assembly, except in certain cases, from arrest, only during their attendance at the sessions of their respective houses, and going to and returning from the same. It is clear, that all matters of privilege must be taken advantage of by writ or be pleaded.

As to the third objection, that no judgment by default was taken against the plaintiff, or rule to show cause, it is sufficient to say, that the law requires neither. If the garnishee neglects to answer, his neglect is considered in law as a confession that he has property of the debtor, and judgment is accordingly rendered against him for the plaintiff's debt. He is entitled to no notice from the plaintiff of his purpose to proceed against him. *Sturges v. Kendall*, 2 Ann. 566. *Pavageau v. His Creditors*, 13 L. R. 354.

The fifth objection taken by the plaintiff, that the judgment was not notified to him in a lawful manner, has no relation to the validity of the judgment.

The sixth objection, that he owed *Meyers* nothing, and had no property of his at the time of the service of the process on him, is closed by the plaintiff's neglect in not answering the interrogatories propounded to him. *Uno cuique mora sua nocet*.

There is nothing in the objection that the plaintiff's name was not mentioned in the order of the judge, directing the garnishee to answer the interrogatories. The judge ordered "the garnishee herein named" to answer. Nor is the charge of even haste or misapprehension on his part, in any point of view, admissible or sustained by the shadow of proof.

The petition charges as one of the reasons for which the judgment ought to be annulled, that it was unduly and improperly obtained by the attorneys of the defendants. The particular acts of impropriety are not alleged, unless the narrative of the conversation between the plaintiff and the sheriff's officer is considered as containing them. It is not even alleged, that the attorneys were privy to what passed between those persons.

The testimony of the sheriff's officer and of another witness, was offered on behalf of the plaintiff, and not received by the court, on the ground, that no evidence was admissible which might have been offered previous to the judgment against the plaintiff.

The evidence is all before us, and ought to have been admitted, had the allegations of the petition been sufficient to authorize the court in annulling the judgment on the ground of fraud or ill practices. But we are of opinion, they are not. The general allegation that the judgment was unduly and improperly obtained by the attorneys, is not sufficient. Those words amount to a complaint which can always be made, in one sense, against what is called, in common parlance, a snap judgment. The article of the Code of Practice relied upon by the plaintiff's counsel, shows clearly what is the character of those ill practices for which judgments may be annulled.

A definitive judgment may be annulled in all cases, where it appears, that it has been obtained through fraud or other ill practices on the part of the party

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in whose favor it was rendered, as if he had obtained the same by bribing the judge or the witnesses, or by producing forged documents; or by denying having received the payment of a sum, the receipt of which the defendant had lost or could not find at the time, but has found since the rendering the judgment.

The depositions make out no case of this kind, according to our understanding of them, and we do not feel authorized to remand the case on account of this evidence, because the allegations of the petition in relation to the ill practices complained of are not sufficient, and, if it was received, would make no change in the result. The case has been argued at bar on the effect of the evidence, of which the plaintiff has had the benefit. The whole difficulty in which he has involved himself, results from his not having heeded the process of the court, and obeyed the order of the judge to answer the interrogatories propounded to him, or, not being bound to answer, in not having exhibited to the court the sufficient reasons to excuse him. He thought proper to commit his interests to an irresponsible person, and to suffer himself to be misled by his advice, instead of following the written directions of the process served on him. Whatever consequences have followed from this course, they are to be attributed to the plaintiff's own neglect, and there is no propriety in straining the law, to relieve a party in such a case.

The fifth objection, we have stated, has no relation to the validity of the judgment. It is urged as a sufficient ground for sustaining the injunction.

The Code of Practice provides, that the plaintiff cannot take execution until after ten days from the notification of the judgment to the defendant. Article 624. The judgment in this case having been rendered without the appearance of the defendant, he is entitled to this term; and his right of appeal also may be reserved to him to date from the service of the judgment. The judgment does not appear to have been notified to him in the mode which the law requires, and, upon motion, it would have been competent for the plaintiff to have had the execution against him quashed. The courts in New Orleans were in session at the time the writ of execution issued and continued open for months after, thus affording to the plaintiff ample means for relief. From the correspondence which took place between the plaintiff and the attorneys of the defendant, we think the plaintiff is precluded from urging the non-notification of the judgment, as a ground for arresting the execution by way of injunction.

The judgment of the district court is therefore reversed; and the petition of the plaintiff dismissed, with costs in both courts, with forty-five dollars damages for extra interest.

### RICHARDS AND ALFRED v. EDWARD BURKE.

Article 2497 of the code, which excludes from the class of redhibitory vices those defects which are apparent, does not relate to such defects as are concealed by reason of the thing purchased being in a box, barrel or package.

Where the plaintiff purchased potatoes, in barrels, and shipped them to Shreveport, and on opening the barrels there, the potatoes were found to be in a rapidly decaying condition, it was held, that the plaintiff could rescind the sale without offering to return them.

**A**PPPEAL from the First District Court of New Orleans, *Larue, J. Wolfe and Singleton*, for plaintiffs. *Frank Haynes*, for defendant. By the court:



PRESTON, J. In February, 1851, the defendant sold to the plaintiffs a lot of one hundred and fifty barrels of Irish potatoes, for \$2 30 a barrel, amounting to three hundred and forty-five dollars. They were immediately shipped to Shreveport, and on arriving there, after an ordinary passage of three or four days, were sold to a merchant of that place for \$3 20 a barrel. But on examination they were found to a great extent rotten, and so worthless, that he refused to receive them.

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The plaintiffs allege, that they were unsound when purchased, and claim from this defendant, their vendor, the price they could have obtained for them at Shreveport, if sound, as damages.

The district court, on conflicting testimony, has determined that the potatoes were unsound when sold. On this question of fact, the testimony produces the same impression on our minds; and, at all events, we could not disagree with the conclusions of that court, unless the testimony was clearly unsatisfactory.

It is said the defect, if it existed, was apparent, and therefore the redhibitory action cannot be maintained. The article of the code relied upon, relates to such defects as are apparent to the senses, without opening boxes, barrels or packages, to discover them by examination, and not to those which are concealed without this examination.

For the same reason, the fact that the master of the steamboat shipped the article as in good order, is no evidence of its intrinsic quality. The bill of lading referred only to the external condition of the barrels. The shipper could not recover on it for the unsoundness of the article.

The potatoes having been found, at Shreveport, in a rotten and rapidly decaying condition, were immediately disposed of at auction and otherwise. The evidence is conclusive, that the best disposition possible, was made of those which are accounted for. The suggestions so much pressed by the defendant's counsel, that they should have been stored at Shreveport on account of the defendant, and notice given to him; or, that they should have been reshipped to New Orleans and tendered back to the defendant, are entirely out of the question, under the circumstances. The master of the boat testifies, that he would not have brought them back to New Orleans for them.

There is no evidence that the defendant knowingly concealed the unsoundness of the potatoes from the plaintiffs, or in any other respect acted in bad faith. The district court erred, therefore, in allowing as damages the price for which they might have been sold, if sound, at Shreveport. The plaintiffs are entitled only to the price they gave, deducting the net proceeds of those for which they account, and the price, per barrel, of those for which no account is rendered.

The account will stand as follows: The price received by the defendant for 150 barrels of potatoes, \$345. Deduct the net proceeds of sales at Shreveport, \$66 73. Thirty barrels unaccounted for, at the original price, \$68 70—\$136 03. Due by the defendant, \$208 97.

The judgment of the district court is reversed; and it is decreed, that the plaintiffs recover from the defendant the sum of two hundred and eight dollars three cents, with interest from the 7th of May, 1851, till paid, and costs in the district court. The plaintiffs and appellees are condemned to pay the costs of the appeal.

## JOSEPH RAFEL v. THE NASHVILLE MARINE AND FIRE INSURANCE COMPANY.

Conditions attached to a policy of insurance form part of the contract.

One of the conditions of a policy was in these words: "Goods held in trust or on commission, are to be declared and insured as such, otherwise the policy will not cover such property. Goods on storage must be separately and specially insured." The assured held the goods in pawn, he therefore held them in trust; and, as he made no declaration and insurance, according to the condition of his policy, they were not covered by it.

A clause in a policy, covering "jewelry and clothing, being stock in trade," does not include such articles as musical instruments, surgical instruments, guns, pistols, books.

THIS case was tried by a jury, before *Larue*, Judge of the First District Court of New Orleans. *M. M. Cohen*, for plaintiff.

As to the law of this case. Description of the subject insured in policy. 1 Arnould, 210, citing Emerigon, c. x, v. 1, p. 292, ed. 1827. 1 Arn. 212—That under a general policy on goods, bullion, coin and jewels are insurable when put on board for the purposes of commerce; and in note (z) to *ibid.*, goods, wares and merchandise will cover dollars, if entered at the customhouse. Arnould, 214—So, whalebone, oil, &c.; and the reason is that in whaling voyages it is the only cargo: citing 4 Pick. 429. Coin is protected by a policy on cargo or freight, 10 doubloons; citing Phillips on Ins. 66. Marshall, b. 1, chap. 7, § 3. Roccus, n. 7. 1 Phillips, 185. 1 Arn. 216—An insurance on gold or silver will cover the loss of a gold cup or silver spoons; citing Emerigon, chap. x, § 1, vol. 1, p. 293, ed. 1827. 1 Arn. 217—Provisions are comprised under the word furniture; so are all the stores and tackle: so outfit is included in insurance on "ship." 1 Arn. 219—The nature and extent of the interest in his ship need not be disclosed on the face of the policy. S. P., 1 Arn. 216, 7, 8, citing 1 Phillips, 1689. "Profits and commissions covered by an insurance on property. *Holbrook v. Brown*. 2 Mass. 280. Cited 1 Phillips, 192. *Pritchett v. Insurance Company of North America*, 3 Yeates, 461.

Of insurable interest: It is not necessary to have an absolute vested ownership or property; but it is sufficient to have a right in the thing insured or a right derivable out of some contract about the thing insured giving benefit from preservation, and prejudice from destruction. 1 Arn. 229, 30. Any creditor having a claim on property pledged to him for advances, has an insurable interest to the extent of his claim. 1 Arn. 251. The trust is as to the surplus, as in case of mortgagee insuring. 1 Arn. 252. Pledgee has an insurable interest. 1 Arn. 253.

Assured need not disclose what the underwriter ought to know, *ex. facts* comprised in the general usages of trade, (1 Arn. 559, 60,) such as that under terms "jewelry and clothing," are included spoons, pistols, velvet, &c. Every well settled or generally known usage of trade is, *prima facie*, considered to form part of the policy. 1 Arn. 66. Terms used in a secondary sense may be explained by parol. 1 Arn. 76. Evidence of usage admitted to show that the term *corn* is meant to comprehend every sort of grain, and also beans, peas and malt. *Ib.* So, on a policy on *furs*, held, that plaintiff could show in evidence that the term "fur," covered the "skins" in the invoice.

The usage of trade may be proved by merchants dealing particularly in that article. Underwriters are bound to know the mercantile meaning of words, and are liable according to that meaning. 7 Cowen, 202. *Astor v. Union Insurance Company*. 8 Humphrey's, 684. Mortgage is immaterial.

The measure of damage is the amount of damage, and the interest on that sum. *Ellmaker v. F. F. Insurance Company*, 5 Barr. 183.

Construction: 3 Harr. 480, *Rafferty v. N. B. F. Insurance Company*. 18 Pick. 419, *Fletcher v. Commonwealth Ins. Company*. 1 Story, 360, *Palmer v. Warren Ins. Company*. 2 Met. 1, *Whelon v. Old Colony Ins. Company*. 2 Anthon, 114, *Duplanty v. Com. Ins. Company*. 23 Wendell, 525, *McLaughlin v. N. C. Ins. Co.* 1 Arnould, 65, note.

Policies are to be construed largely for the benefit of trade and of the assured. *Hillyard*, 201, marginal paging. 1 *Duer*, 161, § 5, 6, 8.

As to trust: 1 *Arn*. 251. L. C. 310, *Pawn*. A statement less in amount than what he is legally entitled to, does not estop from claiming a large amount, if a settlement is not made pursuant to such statement. *Am. Ins. Co. v. Griswold*, 14 *Wend*. 399. Stock in trade, includes tools, fixtures and implements of a mechanic, as a baker. 2 *Hall*, 490. Silver spoons included in household furniture. *Ib.* As to carpenter and interest. *Ib.* 589. A general description sufficient. 5 *R. R.* 424. Defendant presumed to insure with knowledge of all the circumstances. 1 *Hall*, 42.

The case was tried by a jury, and their verdict resolves the meaning of the terms jewelry and clothing, &c., in accordance with L. C. art. 1941.

My sole object in praying for a jury, was to have the verdict of twelve citizens upon the common and usual signification of the words of the contract according to general and popular use. Had the case been decided by the judge alone, this court might well say, we are as competent as he to decide on the common and usual signification of the words of the contract, according to general and popular use; and, if your honors differed from him, you would reverse his judgment. But, when a jury have passed upon it, this court will say the jury is right in their interpretation, or, if we differ from them, it is a matter peculiarly within their province. We will not say that we know the common and usual signification of the words better than twelve of our fellow citizens. We will not annul their verdict on this point. L. C. 1952. S. P., 3 *Ann*. 224. *Ib.* 2 *Ann*. 250. 1 *Phil.* on *Ins.* 44, 45, 46, 47, 48, 50.

*Huntton* and *Bradford*, for defendant. Article of conditions annexed to the policy declares, that "if there is any fraud or false swearing," on the part of the insured, he shall forfeit all claim under his policy. Is it not fraudulent to demand payment for a loss for \$5000, when his loss was not a fourth of that sum? Is it not fraudulent to demand payment for a harp at \$75, when it is proved by plaintiff's own witness, (the witness who first presented the account of the loss,) that the harp was only of the value of \$50? Is it not fraudulent to claim for the loss of "gold pencils, Algerian watches," &c., when it is shown by the testimony of his own witnesses, that these articles were not on the inventory of his stock taken just before the fire, and from which it is said the account of the loss was made out?

In the case of *Levi v. Baillie et al.*, 7 *Bing*. 349, the plaintiff claimed £1085. The jury gave a verdict for £500. The court granted a new trial, on the ground that the loss was fraudulently overrated. In the case of *Wood v. Masterman*, &c., cited in *Ellis*, p. 14, Lord Tenterden instructed the jury, that if the plaintiff has overrated his loss, with a fraudulent intent, they should find not the amount of the loss, but for the defendant. So, too, in *Reguier v. La. State Marine Ins. Co.*, 12 *L. R.* 344, it was held, that as plaintiff had overrated his loss knowingly, he should recover nothing.

By the court:

*SLIDELL, J.* This action is upon a policy by which the defendants insured *Joseph Rafel*, "against loss and damage by fire, to the amount of five thousand dollars, on jewelry and clothing, being stock in trade, contained in the store occupied by him on St. Charles street." There was a verdict in favor of the plaintiff for \$4197 50. The defendants applied for a new trial, which the district judge refused. In doing so, he remarked, that he could not understand upon what principles of law or evidence the jury found the verdict in the case; but preferred to send the matter before this court for final settlement, rather than to grant a new trial before a jury, which would consume time, and might be attended with equally unsatisfactory results.

The first question which presents itself for our consideration is, whether this policy covers a large number of articles which the plaintiff, who was a pawnbroker, held in pawn.

The conditions attached to a policy form part of the contract. This has been long settled. See *Duncan v. Sun Insurance Company*, 6 *Wendell*, 486. *Ellis* on Fire Insurance, p. 12. Moreover, the present policy itself declares, that it is

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made and accepted in reference to the conditions thereto annexed; which are to be used and resorted to, in order to explain the rights and obligations of the parties thereto, in all cases not therein otherwise specially provided for.

The 8th condition of the policy is in these words: "Goods held in trust or on commission are to be declared and insured as such; otherwise, this policy will not cover such property. Goods on storage must be separately and specially insured."

The goods in question were not the property of the plaintiff. He had, at best, a privilege upon them. They were his security for monies advanced to the pawners. His holding was in the nature of a trust for the owners, to whom he was to restore the goods upon their paying him the amount loaned. He must be regarded as coming within the class of holders contemplated in the condition of the policy. In the common law States and in England, from which this form of policy was derived, a pawnee is considered as clothed with the character of a trustee. See Kent, vol. 2, p. 583.

The condition, upon which alone property held by the plaintiff in trust could be covered by the policy, has not been fulfilled, and the policy never attached to the articles so held. It is not, perhaps, necessary to seek for the motive of this condition; but a reasonable motive for it may be easily imagined. As was said in the case of *De Forest v. The Fulton Ins. Co.*, 1 Hall, 84, the declaration and insurance by the trustee or factor of the goods he holds, as goods held in trust or on commission, must have been required, on the ground that the legal title of the trustee and the special property of the factor, though conferring upon each an insurable interest to the value of the goods, yet did not authorize a calculation upon that active zeal and watchful vigilance in the safe-guard of the goods, which an absolute ownership would insure. See, also, *Columbian Insurance Company v. Lawrence*, 2 Peters, 49.

The case of *Brichba v. N. Y. Lafayette Insurance Company*, 2 Hall, 375, is not distinguishable in principle from the present. There the plaintiff effected a policy of insurance against fire, with the defendants, "on goods and furniture contained in his counting room." Among other items of loss, the plaintiff claimed a sum of \$280, for damage by the fire to certain piano fortes, watches, &c., which had been deposited with him for sale, and on which he had made advances. The court observed: The third condition annexed to the policy declares, that goods held in trust or on commission shall not be covered, unless they are insured as such. The articles in question were not the property of the plaintiff; they were held by him "in trust or on commission." He had a lien upon them for advances, which could have been defeated by a repayment of the money advanced. His interest was not absolute, but conditional; and it could not be covered by a mere insurance upon his own property. If the goods in question were to be covered by the policy, they should have been specified in it as goods held in trust or on commission; and it would be violating the plain terms of the third condition annexed to the policy, if this claim were to be allowed.

Another question raised by the appellants is, what kinds of goods are covered by the terms of the policy, which is "on jewelry and clothing, being stock in trade, contained in the store occupied by him on St. Charles street?"

If the words had been simply "stock in trade," it would have been sufficient to cover all kinds of goods belonging to the plaintiff, contained in the store and pertaining to its business, except, perhaps, such as, under the conditions of the

policy, might require a special designation. But those words, as they are here used, are limited by the antecedent words, and cannot be considered as comprehending any other effects besides jewelry and clothing.

There was no attempt to show by evidence, that any peculiar meaning is attached to such a description by the usage of trade; and we are therefore left to construe the words according to their plain, ordinary and popular sense.

Testing the rights of the parties by this standard, we are quite unable to say that the terms "jewelry and clothing," include such articles as musical instruments, surgical instruments, guns, pistols, books, and many others that appear in the statement of loss.

Excluding the articles held in pawn, and those which cannot be classed either as jewelry or clothing, the loss sustained by the plaintiff is below the claim made by him under oath. The excessiveness of the claim over the real loss within the policy, was a fraud, it is said, which, under one of the conditions annexed to the policy, deprived the plaintiff of all recourse. This condition requires the assured who has sustained a loss, to deliver in a particular account of such loss or damage, under oath; and provides, that if there appear any fraud or false swearing, the insured shall forfeit all claim under the policy. To subject the plaintiff to this penalty, it should appear that the exaggeration of his claim was wilful and fraudulent. The plaintiff may well have thought he was covered for the goods held in pawn; and his mistake with regard to his legal rights, is not to be visited upon him as a fraud or perjury.

It is therefore decreed, that the judgment of the district court be reversed, and that this cause be remanded for a new trial; the costs of this appeal to be paid by the plaintiff.

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### GEORGE LONGWORTH, PRAYING FOR A WRIT OF HABEAS CORPUS.

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A judge or court, authorized to issue a writ of *habeas corpus*, cannot refuse bail, by sufficient securities, except for capital offences, where the proof is evident or the presumption great. It is the constitutional right of the prisoner to demand it, and it is not in the discretion of the judge to deny it, nor does the conviction of the prisoner deprive him of the right.

**A** PPEAL from the First District Court of New Orleans, *Larue, J. John R. Grymes*, for prisoner. By the court: (*Rost, J.*, dissenting.)

**PRESTON, J.** The prisoner was prosecuted for larceny, convicted and sentenced to one year's imprisonment at hard labor in the penitentiary, and to pay the costs of prosecution. He took an appeal to the Supreme Court.

Immediately afterwards, he applied to the executive for a reprieve and pardon. A reprieve was granted by the governor for good and sufficient reasons, but upon the condition, that he should remain in the parish prison until the meeting of the next Legislature, in order that the sense of the Senate may be made known, as to their concurrence with the executive in a pardon.

The governor was obliged to prescribe this condition of his clemency, under a law passed at the late session of the general assembly, but as the Legislature may not meet for two years, the condition, except as to the ignominy, is more onerous than the punishment.

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The prisoner therefore applied to the district court to be discharged from imprisonment, on giving bail to surrender his person at any time to be dealt with according to law. The district court refused to bail him, because he was a convict under sentence and could not be bailed, notwithstanding his appeal.

In the case of the *State v. Jones*, convicted of burglary, this court held that the prisoner could be bailed pending an appeal although convicted. The 108th art. of the Constitution was cited as the basis of the opinion. It prescribes, that "all persons shall be bailable by sufficient sureties unless for capital offences, where the proof is evident or presumption great."

But at that time the 10th section of an act approved the 30th of May, 1846, was in force, which permitted the accused, if the offence was bailable, to be bailed after conviction when an appeal was taken.

On the contrary, the general assembly have, at its recent session, expressly enacted: "That in all cases where persons convicted of crimes shall be sentenced to death or to imprisonment at hard labor, it shall be the duty of the sheriff of the court where such sentence has been pronounced, immediately to take such person into custody, and to keep such person confined in the parish jail, notwithstanding any appeal or reprieve, until the final action of the Supreme Court on the appeal, or the action of the Senate on the reprieve, shall have determined what disposition shall be made of the person so sentenced."

Notwithstanding this law, the prisoner has applied to this court for a writ of *habeas corpus*, and asks to be discharged from imprisonment, on giving sufficient bail, conditioned as offered to the district court.

His counsel insists that the act passed at the late session of the Legislature conflicts with the 108th art. of the Constitution, and that he is not bound by it. His application, therefore, imposes upon us the very serious duty of examining the constitutionality of an act of the Legislature. This is a painful duty under any circumstances, and we feel the more reluctance in performing it on this occasion, as we are fully impressed with the truth and weight of the observations of the attorney general, that the construction we are obliged to give to the article in the Constitution, may conflict with the best interest of society, by enabling a wealthy criminal to escape justice by means of his property.

The convention in providing, by the 108th art. of the Constitution, for the liberty of the citizen, though accused of crime, must have referred to the principles of bail, in criminal cases, as they existed at the time of the adoption of the Constitution. It becomes necessary, therefore, by a thorough search to ascertain what those principles were.

Blackstone in his commentaries says: "It is agreed that the Court of King's Bench, or any judge thereof, in time of vacation, may bail for any crime whatsoever, be it treason, murder, or any other offence, according to the circumstances of the case. And herein, he adds, the wisdom of the law is very manifest, because cases may arise where it would be hard and unjust to confine a man in prison though accused even of the greatest offence." In Coke's entries from 354 to 356 it will be seen, that the power to bail, even in cases of murder, was exercised in the reign of Queen Elizabeth. So Lord Mohan, found guilty of murder by the coroner's inquest, in the reign of William and Mary, was bailed. 1 Salkeld's R. 103.

Chief Justice Marshall declared, upon the trial of Colonel Burr, that the court had power to bail a person indicted for treason according to its sound discretion.

Thus, prisoners accused of the most heinous crimes have been bailed, the courts or judges exercising, in each case, the utmost discretion of which they were

capable. And if the power to bail may be exercised as to the greatest crimes, of course it may be exercised as to crimes of a lower grade of guilt.

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But the rule laid down by Bacon, title bail, letter D, and adopted by the district judge, that if a person be attainted of felony, or convicted thereof by verdict, general or special, or notoriously guilty of treason or manslaughter, &c., by his own confession or otherwise, he is not to be admitted to bail without some special motive to grant it, has always regulated the discretion of courts and judges at common law. Still there was the exercise of discretion without certain rules to guide it, which has ever been regarded with jealousy by a people tenacious of liberty.

The people of Louisiana have, therefore, by their Constitution, restrained the discretion of the judges and enlarged the liberty of the citizen, by declaring, "that all prisoners shall be bailable by sufficient securities, unless for capital offences, where the proof is evident or presumption great, and the privilege of the writ of *habeas corpus* shall not be suspended unless, when in cases of rebellion or invasion, the public safety may require it." Art. 108.

A judge or court authorized to issue a writ of *habeas corpus*, cannot therefore refuse bail by sufficient securities, except for capital offences, where the proof is evident or the presumption great. It is the constitutional right of the prisoner to demand it, and it is not in the discretion of the judge to deny it.

Does the conviction of the prisoner deprive him of this constitutional right? A conviction did not deprive the judges of the power to bail, according to their discretion, at common law. In England, a person improperly convicted was relieved, not by a new trial, but by the king's pardon, and no doubt might be bailed until the pardon could be obtained.

In many cases where persons were entitled to relief, they have been bailed by the judges after conviction. In Bacon's Abridgment, title, bail in criminal cases, it is laid down, that "a man convicted of felony upon evidence, by which it plainly appears to the court that he is not guilty of it, may be bailed."

In Strange's Reports, p. 9, in the case of *The King v. Bishop*, he was convicted of a libel and moved to be bailed, on the ground that he was in a bad state of health. The court said, as a punishment commensurate with his offence might endanger his life, we will bail him for the present.

In the same vol. p. 531, in the case of *The King v. Reader*, the defendant was convicted of keeping an ale house without a license, and was thereupon sentenced and committed for one month, as the act directed. After he had been in jail a fortnight, he brought a *certiorari*, and, upon the return of it, was admitted to bail, the court being of opinion that if the conviction was confirmed, they would commit him in execution for the remainder of the time.

In the case of *The King v. The Mayor of Salfash*, the defendant, who had been indicted and convicted of a riot, and was confined under sentence, was bailed, because he had brought a writ of error. 2 Shower's R. p. 96.

In the case of *Lisle*, he was indicted for the murder of *Richard Armstrong*, and was thereupon tried and convicted of manslaughter. The brother of *Armstrong* filed a bill of appeal of murder. *Lisle* prayed, but was not immediately admitted to the benefit of clergy. He thereupon moved that he might be bailed, which was opposed by *Armstrong* because he was found guilty of manslaughter, but the court bailed him to appear from day to day. The appeal of murder was subsequently dismissed, and he was surrendered by his bail and branded for the manslaughter of which he was convicted. Salkeld's R. p. 60. See also the case of *The King v. Elwell*, 2 Strange 794.

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In many of the States of the Union, an appeal or writ of error is allowed by law to obtain relief from an improper conviction. Where that means of relief is accorded, until the appeal or writ of error can be tried, the party prosecuting it has often been bailed notwithstanding his conviction.

In the case of *The People of New York v. Croswell*, convicted of a libel upon the President of the United States, the prisoner was bailed by the Supreme Court of New York until his case could be heard by that court. 1 Cain's R. p. 148.

In the same vol. p. 72, *McNeil*, having been convicted of a conspiracy, was bailed by the Supreme Court of New York, until the record should be made up, to pronounce sentence.

At page 431 of 1 Wheeler's criminal cases, Recorder Riker mentions the case of *Mr. Barnwell*, who was indicted of manslaughter, pleaded guilty, and was continued under bail; and in the case then under his consideration, he held, that a person convicted by a magistrate of vagrancy might, upon affidavit disclosing the merits of his complaints, obtain a *certiorari*, and upon giving bail to abide the judgment of the Supreme Court, be entitled to his discharge.

In some States express provision is made by law, enabling convicts to give bail until their appeal or writ of error is tried. Thus, in Mississippi, "it is provided that in all cases not capital removed into the Supreme Court, the defendant shall enter into recognizance, to be approved by the judge of the circuit court, in which the prosecution is pending, in such sum as shall be directed by said court to appear before the Supreme Court at their next succeeding term, and abide the sentence or judgment which may be there pronounced against him." Revised Statutes of 1824, p. 138.

So in Massachusetts, the appellant is authorized to recognise to the Commonwealth, in such reasonable sums, and with sureties, as the Court of Common Pleas shall order, with condition to appear at the court appealed to, and there to prosecute his appeal and to abide the sentence of the court, &c. 2 Revised Statutes, p. 763.

Indeed, it is probable that a little research would show that, in most of the States where appeals or writs of error are allowed in criminal cases, similar relief is extended to prisoners either by statute or by the practice of their courts, by suspending the execution of the sentence and all the effects of conviction during the pendency of the appeal or writ of error; otherwise the hope of relief would be attended with certain evil, rendering its advantages doubtful.

There is nothing in the case of the *State of South Carolina v. Bryan Connor*, adverse to the prisoner's application. Being convicted of forgery, the Constitutional Court of South Carolina approved the refusal of the circuit court to admit a defendant to bail in a case so highly criminal; but admitted the necessity of an exercise of discretionary power, even after conviction, in cases of lower offences, to bail for the appearance of offenders at the Constitutional Court of Appeals, to abide the final sentence of the court. 2 Bay's Rep. 37. The common law doctrine, giving the judges a discretion, prevailed, because the principle above quoted from our Constitution was not contained in the Constitution or laws of South Carolina. That principle takes away all discretion, and leaves but a single distinction. Capital cases are not bailable after conviction, because the presumption of guilt is great; all other cases are bailable, because the Constitution makes them so, without distinguishing between heinous or lower offences, as to the right of giving bail.



But in the case of the *State v. Ward*, 2 Hawke's North Carolina Rep. p. 443, it was held, that after a conviction of an offence, not capital, and appeal to the Supreme Court, the prisoner is not entitled to be bailed as a matter of right; it is a question addressed to the sound discretion of the judge before whom the appeal is taken. And it is to be observed, that the Constitution of North Carolina contains the identical clause quoted from our Constitution. This, then, is a decision directly in point, against the application in the present case.

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We cannot so interpret the clause in our Constitution, the words of which are plain, unambiguous and imperative, "that all prisoners shall be bailable, by sufficient securities, unless for capital offences." They are entitled to be bailed as a matter of right, and the judge has no discretion except in fixing the amount of the security.

It has been argued, that the conviction leaves no doubt of the guilt of the accused. That is not absolutely certain, since an appeal is allowed by the Constitution and laws of the State. But suppose the guilt certain, it is not more so than if an individual, accused of perjury or forgery, should voluntarily declare, in writing, under his signature, that he had committed the perjury or forgery of which he was accused; and yet it will not be denied that our Constitution allows him, in such case, to be bailed until sentenced to punishment.

So in this case, the prisoner is not undergoing the sentence of the law for his crime, but is a prisoner awaiting the final determination of his case by the Supreme Court, to which the 63d article of the Constitution allows him an appeal.

The probability of an offender absconding, at least when the opinion of the Supreme Court is known to be adverse to him, has been much pressed in the argument. The argument has great weight against the provision in our Constitution, but while the provision exists the danger must be counteracted, as much as possible, by the amount of bail to be required. *Lisle*, as we have seen, who, convicted of manslaughter, was at large on bail, was surrendered in execution, and branded for his crime.

A judge cannot violate or abridge the right, under the Constitution, of prisoners to be bailed, in all except capital cases, until the final judgment of the law, condemning to merited punishment, shall shut the doors of this constitutional privilege upon them.

We adhere to the injunction of the Constitution the more readily, as probably this is the last case in which we shall be called upon to exercise the power of bailing after conviction, as the considerations urged by the attorney general will, no doubt, induce the coming convention to restrain the power to bail after conviction.

There are other considerations operating upon the court. The prisoner appears to be in bad health, and might perhaps be deprived, by death, of the executive clemency, if detained in the Parish Prison two years before he could enjoy it.

Further, we do not know the motives which induced the executive to reprieve him, but possibly they may be of such a character as to induce the governor to extend to him the reprieve, even if the judgment of the district court against him should be affirmed by this court, and although he should be under bail.

We are therefore of opinion, that the prisoner should be bailed; and as the district court considers the law we have examined, forbidding it, constitutional and conclusive upon him, we will bail him in the sum of five thousand dollars.

It is therefore ordered, adjudged and decreed, that the sheriff take good and sufficient surety from the prisoner, in the sum of five thousand dollars, condi-

LONGWORTH,  
PRAYING FOR A  
WRIT OF  
HABEAS CORPUS

tioned, that as he had been convicted of larceny, and sentenced to hard labor for one year in the penitentiary by the First District Court of New Orleans, but had appealed to the Supreme Court, which appeal had not been tried; that when the decree of the Supreme Court in this case shall be made and duly certified to the said district court, the said *Longworth* shall appear from day to day in said district court, and there be ready to abide the further orders of the district court, and not depart without the leave of the court. It is further ordered, adjudged and decreed, that the bond be submitted to this court before the discharge of the prisoner, and afterwards be deposited with the clerk of the First District Court of New Orleans, for safe keeping; and thereupon, let the prisoner be discharged from custody.

EUSTIS, C. J. and SLIDELL, J. concurred.

ROST, J. dissenting. I adhere to the opinion of the Supreme Court of North Carolina, in the case of the *State v. Ward*, decided under a constitutional provision similar to ours, that after a conviction of an offence not capital, the prisoner is not entitled to be bailed as a matter of right, and that it is a matter adverse to the sound discretion of the court, before whom the appeal is taken.

Conceding that the Legislature could not take away that discretion, it has been exercised in the present case, and the application has been refused. I think we should not interfere.

### SARAH HUBBELL et al. v. MARY INKSTEIN et al.

Slight proof of the celebration of marriage is sufficient, where the spouses uniformly, publicly, and for a long time bear to each other the relation of husband and wife.

Where a man married two wives, and the second wife was in good faith, each wife is entitled, at the death of the husband, to one-half of the community.

**A**PPEAL from the Second District Court of New Orleans, *Lea, J. Magne* and *Koontz*, for plaintiffs. *Durant* and *Horner*, and *P. C. Cuwillier*, for defendants. By the court:

ROST, J. This is an action by the widow and children of *Julius Hubbell*, who died in this city in 1837, claiming from the defendants the entire succession of their husband and father.

The defence is a general denial and an averment, that the defendant, *Mary Inkstein*, married *Julius Hubbell* in 1826, believing him a single man, and that the other defendants, with the exception of *Joshua Peebles*, are the issue of that marriage, born during the continuance of her good faith, and that even if the allegations of the plaintiffs should be true, they also are entitled to all the advantages which would result from a lawful marriage.

The succession of *Julius Hubbell* was composed exclusively of community property, and consisted of money, with which *Mary Inkstein* purchased a house and lot for herself and children. The two eldest of those children having become of age, sued her for their share of their father's succession, and obtained against her a judgment for \$460 each, which, on appeal, was affirmed by this court. 5 Ann. 524. Under this judgment, the house and lot were seized and sold to *Joshua Peebles*, for \$1850, on twelve months' credit. On the suggestion of *Mary Inkstein*, that this house was the only property she had to satisfy the

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claims of her five children, and that as the price bid was less than they were entitled to receive, the proceeds of the sale should be distributed among them *pro rata*. This sum has been arrested in the hands of the sheriff, subject to the further order of the court. All those who claim to be paid out of it, are parties to this suit.

The district judge was of opinion that the allegations of the defendants were made out, and that, for the purposes of this suit, they were to be considered as a lawful wife and legitimate children.

The plaintiffs and appellants insist that there is error in this part of the judgment, and that the marriage is not proved by legal evidence. The argument of their counsel would apply, in all its force, to a case in which a woman who had not the *status* of a lawful wife, would claim to be recognized as such after the death of the alleged husband. They have entirely overlooked the *possession d'état* which *Mary Inkstein* and her children have uniformly enjoyed, as shown by the unimpeached testimony of witnesses, and by the still stronger evidence that, after the death of *Hubbell*, *Mary Inkstein* was recognized by the court as his widow, was confirmed as such in the tutorship of his children, and placed in possession of his succession, without any one contesting or doubting her right. If to this be added the fact of her cohabitation with *Hubbell*, to the time of his death, a slight proof of the celebration of the marriage is sufficient to establish it. We are sure that there are hundreds of marriages, in Louisiana, in relation to which more satisfactory evidence than is found in this record, could not be obtained.

It is said that in the certificate of marriage adduced, her name is not properly spelt. But as she can neither read nor write, and it is not shown she had any relations in this country, no one can tell how her name should be spelt; and the French priest who married her, at Mobile, is as apt to be right in the spelling as the counsel who attended to the proceedings in the succession of her husband.

It is also urged that there is no proof that the person, married in Mobile, was the defendant in this suit. The names of the husband and wife, and the date of the act are, under the facts of the case, *prima facie* evidence of the identity of the parties, and sufficient to throw upon the plaintiffs the burden of proving that the marriage in Mobile was between other persons. It may be true, that *Hubbell* had his marriage celebrated in Mobile for purposes of concealment, but this cannot affect the good faith of his wife; nor do we think her declaration, that it had been celebrated in New Orleans, sufficient to produce that effect. *Succession of Prevost*, 4 Ann. 348.

Being of opinion that there is nothing in the record to show that *Mary Inkstein* ceased to be in good faith, before the death of *Julius Hubbell* or until long afterwards, we consider her entitled to the rights of a lawful wife, and it becomes necessary to ascertain what those rights would be.

*Julius Hubbell* came here from New York, in 1820, and remained till his death, in 1837. He was an inhabitant of the State, and the property acquired by him during his residence was subject to our laws, and must be held, under the circumstances of this case, to have been community property between his first wife and himself. The marital cohabitation did not fail through her fault, and she is not to lose her rights on account of the fault and misconduct of her husband.

In the case of *Patton v. The Cities of Philadelphia and New Orleans*, in many respects similar to the present, we held, that under the former laws of the

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v.  
INKSTEIN.

country, where a man married two wives, and the second wife was in good faith at the death of the husband, each took one-half of the community property. *Hubbell* died after the repeal of those laws. But the principle upon which they rested, appears to us clearly deducible from those now in force; and the reasons of the law, as stated in *Patton's* case, have equal force under both systems. The wife is now, as under the Spanish laws, entitled, at the dissolution of the marriage, to one-half of whatever may remain after paying the community debts. This claim may be assimilated to a debt from the succession of the husband to the wife, and as such it excludes the right of inheritance of the children. 1 Ann. 98.

We are therefore of opinion, that *Sarah Hubbell* and *Mary Inkstein* were each entitled to one-half of the acquets and gains at his death. But as the defendants possessed, in good faith, they made the fruits of the property theirs, and the plaintiff, *Sarah Hubbell*, has no claim for interest, except from the judicial demand.

We must now examine the claim of the plaintiffs against *Joshua Peebles*. They aver, that the house and lot having been purchased with the funds of the community, they have the right to ratify the purchase, and to claim them as community property. They further allege, that if the property does not belong to the community, they have a legal mortgage upon it, which they pray may be enforced. Without determining what the rights of *Sarah Hubbell* might be, if the property was still in the possession of *Mary Inkstein*, it is sufficient to say, that she purchased in her own name, and that the title remained in her name, on the public records, for many years, and until it was sold to the defendant. He cannot, therefore, be affected by secret equities existing between her and the plaintiffs. The minors having no claim upon the property, it is clear that there was no mortgage, in favor of *Sarah Hubbell*, to secure community rights. The sale to *Peebles*, made under a valid and subsisting judgment, transferred the property to him, and the only question in the case which concerns him, is to to whom he is to pay the price.

The petition prays for a judgment against *Mary Inkstein* and her children, for the entire succession, and contains, also, a prayer for general relief. We think with the district judge, that the plaintiff is not entitled to a personal judgment against the children of the second marriage. But they have rights against them, which may, under the pleadings, be determined in the present suit.

*James* and *Dorothe Hubbell*, the two heirs of age, obtained against their mother a judgment for the sum of \$460 each, this being the amount of their share in the half of the community property, supposed to belong to the succession of their father. In this suit *Sarah Hubbell* evicts them of their title to the community, and is adjudged to be the sole owner of the share of her husband. The judgment rendered in favor of the supposed owners must, therefore, inure to her benefit, and she is entitled to receive the amount made under the execution, in satisfaction of that judgment, and in part payment of her claim.

It is therefore ordered, that the judgment in this case be reversed. It is further ordered, that the plaintiff, *Sarah Hubbell*, recover from the defendant, *Mary Inkstein*, \$2257 13, this being the undivided half of the succession of *Julius Hubbell*, with legal interest from the 14th February, 1851, till paid. It is further ordered, that the judgment obtained by *James* and *Dorothe Hubbell*, against their mother, *Mary Inkstein*, be, and is hereby adjudged to be, the property of *Sarah Hubbell*. It is further ordered, that *Joshua Peebles* be

ordered to pay over to the said *Sarah Hubbell*, the price of the property purchased by him, under execution, in the suit of *James Hubbell et al. v. Mary Hubbell*, and that upon payment thus made, the judgment in that suit be entered satisfied, and the whole amount paid entered as a credit upon the present judgment. It is further ordered, that *Mary Inkstein* and her children pay costs in both courts.

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INKSTEIN.

### THE STATE OF LOUISIANA v. WILLIAM FOSTER.

Where an offence, other than willful murder, arson, robbery, forgery and counterfeiting, has not been committed within the year next preceding the indictment, the indictment should show, that the accused cannot avail himself of the limitation, by charging that he absconded or fled from justice, or that the crime was not discovered and denounced in the manner pointed out by the act of 25th March, 1844, until within a year of the finding by the grand jury.

The indictment charged that the mortal stroke was given in the parish of St. Bernard, but that the deceased languished and died on Lake Borgne. It was held, that it was proper to charge in the indictment, the truth that the death occurred on Lake Borgne, and it was immaterial whether it occurred within the jurisdiction of Louisiana, Mississippi, or on the high seas, within the jurisdiction of the United States.

**A** PPEAL from the District Court of the parish of St. Bernard, *Rousseau, J. Charles Bienvenu*, District Attorney, and *Isaac Johnson*, Attorney General, for the State. *J. M. Ducros*, for defendant. By the court :

**PRESTON, J.** The prisoner was accused of murder, convicted of manslaughter, sentenced to the penitentiary, and has appealed.

He complains that, being in prison, he was not allowed to procure for his defence counsel of his choice. He was arraigned on the 5th of January, 1852, and was not tried until the 12th of that month. This interval afforded ample time for him to have procured counsel of his choice, in default of which, the court assigned him counsel, who it appears by the record and briefs, was fully competent to defend him.

There are other grounds presented in support of an application for a new trial, which it has heretofore been decided are not tenable in this court.

In arrest of judgment, it is urged that the place where the death took place, was not set forth in the indictment with sufficient certainty. It is charged in the indictment, that the mortal stroke was given in the parish of St. Bernard, within the jurisdiction of the Second District Court, but that the deceased languished and died on Lake Borgne.

The common law adoption by our Act of 1805, was modified by the statute of II. George, which provides that, "where the stroke has been given in England, and the death occurs out of England, or the reverse, the killing may be inquired of in that part of England where either the death or stroke shall happen respectively." 1 East. p c. 365, and so the late Court of Errors and Appeals, in criminal cases, held in the case of *The State v. McCay et al.* "That where the mortal stroke was given in this State, but the death occurred in the State of Mississippi, the crime might be prosecuted in the parish where the mortal stroke was given." 8 R. R. 545. It was proper, therefore, to charge in the indictment the truth, that the death occurred on Lake Borgne, and it was immaterial whether it occurred within the jurisdiction of Louisiana, Mississippi, or on the high seas, within the jurisdiction of the United States.

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v.  
FOSTER.

Another ground urged for arresting the judgment, presents more difficulty. The indictment was found the 5th of January, 1852. It charges, that the crime was perpetrated in November, 1850, more than a year before the indictment was found. The petit jury found the prisoner guilty of manslaughter only, and thereby substantially acquitted him of murder. Now, the Act of 1805 prescribes that, "no person shall be prosecuted, tried or punished for any offence, willful murder, arson, robbery, forgery and counterfeiting excepted, unless the indictment or presentment for the same, be found or exhibited within one year next after the offence shall be done or committed, provided, that nothing herein contained shall extend to any person absconding or fleeing from justice."

Another exception was made to the limitation of prosecutions, by the 3d section of an Act approved the 25th of March, 1844, that it should commence only from the time the crime or misdemeanor was discovered and made known to a public officer having power to direct its investigation or prosecution, page 80.

It is not charged in the indictment, that the prisoner absconded or fled from justice, nor is it alleged that the crime was not discovered and denounced until within a year of the finding by the grand jury; until one or the other of these facts are alleged and proved to the satisfaction of a petit jury, the prisoner, in the words of the statute, cannot be "punished" for manslaughter. Every thing essential to his punishment must be found by a jury of his country, and must appear of record; otherwise, the law does not authorize a court to pass sentence upon him.

It is true, it was alleged in opposition to the motion in arrest of judgment, that the prisoner had fled from justice, and the governor's proclamation offering a reward for his apprehension, was produced to prove it. We do not think the court had power to try that fact, but that it should have been distinctly charged in the indictment, and proved on the trial by the oaths of witnesses and other legal testimony, to the satisfaction of the jury, to support their verdict for manslaughter. We are therefore obliged to arrest the judgment, and we do it more readily, as if in point of fact the prisoner was a fugitive from justice, this prosecution will not bar another for manslaughter, containing the charge that he fled from justice.

The verdict against the prisoner is set aside, and the judgment of the district court arrested, without prejudice to a legal prosecution for the crime of manslaughter.

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#### SAME CASE—ON AN APPLICATION FOR A RE-HEARING.

To maintain the plea of *autre fois convict*, the crime must not only be the same for which the defendant was before convicted, but the conviction must have been lawful on a sufficient indictment.

The accused was indicted for murder, and convicted of manslaughter. The indictment was insufficient to sustain the charge of manslaughter, and judgment was arrested, but without prejudice to a legal prosecution for the crime of manslaughter.

By the court:

PAXTON, J. The defendant asks for a re-hearing on the ground, that having been convicted of manslaughter, the verdict having been set aside and judgment arrested by this court, he cannot be put in jeopardy again for the same offence. We would have inferred the contrary from the decision of the late Court of Errors and Appeals, in the case of *The State v. Hornsby*, 8 R. R. 583. Be

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FOTER.

that as it may, it seems to be a well settled principle of criminal law, that the plea of *autre fois convict*, depends, like the plea of *autre fois acquit*, on the principle, that no man shall be put more than once in jeopardy for the same offence; and, in order to maintain the plea, the crime must not only be the same for which the defendant was before convicted, but the conviction must have been lawful, on a sufficient indictment. 1 Chitty 376. 9 East. 441. In the present case, the conviction was on an indictment clearly insufficient to sustain the verdict for manslaughter, more than a year having elapsed between the commission of the crime and the prosecution.

The re-hearing is refused.

### A. THOMPSON v. E. CHAPMAN.

Where an appeal has been granted, on motion in open court, at the same term at which the judgment was rendered, no citation of appeal is necessary.

Where the clerk's certificate is defective, and no fault can be imputed to the appellant, the Supreme Court will, on affidavit, grant time to correct the certificate.

That portion of the statute of 1840, abolishing imprisonment for debt, which subjects the defendant to imprisonment for giving an unjust preference, only until he pays the debt, partakes of a civil character. It merely excepts that case from the law to abolish imprisonment for debt, and, as to it, still allows imprisonment as a civil remedy.

The petition charged that the plaintiff sold and delivered property to the defendant for cash, and that defendant removed, disposed of, or concealed, or covered the same in such a manner, that plaintiff could not render said property liable for the price. It prayed, also, for his arrest and punishment. The jury gave judgment for the sum claimed, but dismissed the charge of fraud. By the court: This is a civil remedy, of such a highly penal character that we should never feel authorized to convict the debtor of the fraud, and punish him with imprisonment, which might extend to three years, without the verdict of a jury. And, although we would remand the cause for a new trial, if any errors of law had occurred in the progress of the trial, we are unable to do so for differing with the jury as to the effect of the evidence alone.

**A** PPEAL from the First District Court of New Orleans, *Larue, J. Frank Haynes and Randal Hunt*, for plaintiff. *J. R. Grymes and J. M. Wolfe*, for defendant. On motion to dismiss the appeal. By the court:

**P**RESTON, J. A motion has been made to dismiss this appeal, on the ground that no citation of appeal issued in the case, to the appellee, notifying him of the appeal granted. It was not necessary. The appeal was granted on motion, in open court, at the same term at which the judgment was rendered. Acts of 22d March, 1843, p. 40.

The appellee moves for the dismissal of the appeal, on the further ground, that the certificate of the clerk of the district court does not show that the record contains all the evidence, and is a complete record. The counsel of the appellant makes affidavit, that the record contains all the evidence offered by the parties on the trial of the cause, and states that the defect in the clerk's certificate was discovered only when the cause was called for trial and the motion to dismiss the appeal was made.

The act of the 20th of March, 1839, provides, that no appeal shall be dismissed on account of any defect or error in the certificate of the clerk, whenever it shall appear that such defect or error is not imputed to the appellant. B. and C., p. 181. The act embraces the present case.

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CHAPMAN.

The counsel of the appellant, on his affidavit and statement, applies for time to have the clerk's certificate corrected. He is entitled to it, by the act just cited, as well as by the 898th article of the Code of Practice. Let him have until Monday next, to have the certificate corrected.

It is therefore ordered, adjudged and decreed, that the plaintiff and appellant have until Monday next, to have the clerk's certificate of the lower court corrected.

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SAME CASE—ON THE MERITS.

By the court:

PRESTON, J. The plaintiff sold the defendant a quantity of oats, sued and obtained judgment for the price, notwithstanding various defences by the defendant.

But the plaintiff further alleged, "that after said *Chapman* had obtained the delivery of said sacks of oats, said *Chapman* removed and disposed of to individuals, and concealed or covered the same in such a manner that your petitioner cannot make or render said sacks of oats liable for the same, thereby rendering said *Chapman* liable to the pains and penalties of the act of 1840, to abolish imprisonment for debt."

"Your petitioner prays, in consideration of his affidavit and premises, that said *Chapman* be arrested and punished according to law."

The 10th section prescribes: "That if a debtor, who has not voluntarily surrendered his property to his creditors, or has not been proceeded against for a surrender, under the provisions of this act, shall, in violation of any existing law, have, within the year, given an unjust advantage or preference to any one or more of his creditors, by payment or otherwise, or shall have anticipated the payment or provided for the payment of a debt not due, the effect whereof shall be to injure the complaining creditor; or shall purchase property for cash, the delivery whereof shall be made to him, and then shall sell or dispose of the same without paying his vendor, or shall remove the same beyond the reach of such vendor, or shall conceal or cover the same in any manner so that his vendor cannot render the same liable, (or shall fail to pay over money received or collected for or deposited with him for another,) or shall have made a conveyance, or transfer, or mortgages, or pledge of his property, to the prejudice of the complaining creditor; any of such facts shall be held presumptive evidence of fraud, liable, however, like all other presumptions, to be disproved."

The 13th section provides, "That when the causes mentioned in the tenth and eleventh sections of this act shall be tried, if the jury or court, as the case may be, shall be satisfied that the defendant has been guilty of defrauding the complaining creditor, the court shall condemn the defendant to be imprisoned for a period not exceeding three years; and if it shall appear that the defendant has only been guilty of conferring an unjust preference or advantage upon another *bond fide* creditor, whose demand was actually due, such defendant may be relieved from the imprisonment, by paying the complaining creditor, or repairing the injury or fraud complained of; and in case the jury or court, as the case may be, shall find the charges against the debtor unfounded, and that the creditor has proceeded without reasonable ground of suspicion, they may impose such damages against the party complaining as may be reasonable and just."



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That portion of the statute which subjects the defendant to imprisonment for giving an unjust preference, only until he pays the debt, partakes of a civil character. It merely excepts that case from the law to abolish imprisonment for debt, and, as to it, still allows imprisonment as a civil remedy. And the punishment of the fraud charged in this petition, has been held by this court, and also by our predecessors, to be a civil remedy. 4 Ann. 346. 15 L. R. Yet it is to be considered, that the punishment to be inflicted, if the accused is found guilty, may extend to three years' imprisonment.

We can only regard this part of the statute as a civil remedy, by supposing it the intention of the Legislature, though not expressed, that the imprisonment should terminate on payment of the whole debt and costs. But, even in this point of view, it is a civil remedy of such a highly penal character that we should never feel authorized to convict the debtor of the fraud, and punish him with an imprisonment, which might extend to three years, without the verdict of a jury. And, although we would remand the cause for a new trial, if any errors of law had occurred in the progress of the trial, we are unable to do so for differing with the jury as to the effect of the evidence alone. Such a course would trench too much upon the humane principle, that no man should be tried twice for the same offence, having been acquitted after a fair trial of the facts charged, by a jury of his country. And we the more readily come to this conclusion, as the plaintiff still has all the civil remedies to which other creditors are entitled.

The judgment of the district court is affirmed, with costs.

Application for a re-hearing refused.

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### WILLIAM KEAY v. NEW ORLEANS CANAL AND BANKING COMPANY AND H. J. RANNEY.

The plan, by which the vendor sells property, forms a part of the title conveyed by him, and he warrants whatever may fairly be inferred from it.

Suits for damages should not be matters of speculation, but reasonable claims for indemnification.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. A. and W. D. Hennen*, for plaintiff. *Hunton and Bradford*, and *R. and T. G. Hunt*, for defendants. By the court:

PRESTON, J. The plaintiff holds a parcel of ground, by titles derived from the *New Orleans Canal and Banking Company*, being the entire irregular portion of ground, bounded by the New Shelled Road, Solis, Euphrosine and Maunsel streets.

The bank sold the ground in 1845, by a plan made under their direction, exposed by their auctioneer, and deposited for reference with their notary. It is proved by witnesses, that a sale by a plan, must give effect to everything apparent on the plan. The Civil Code also provides, that equity, usage and law, supply such incidents, as the parties may reasonably be supposed to have been silent upon, from a knowledge, that they would be supplied from one of these sources. Art. 1959. We consider, therefore, that the plan by which the plaintiffs sold the property, formed a part of the title conveyed by them, and that they warrant whatever may fairly be inferred from it.

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CANAL AND  
BANKING Co.

The plan exhibits a vacant space in front of the property marked "shelled road," and the title made to the original purchaser, calls for a "front on the shelled road."

In 1849, the defendants excavated a canal twelve feet wide and five feet deep, within three feet of the entire front of the plaintiff's property. They extended it several hundred feet above and below his property.

The plaintiff complains of this canal; that it is an unauthorized nuisance established by the defendants, greatly detrimental to his property; alleges that he has suffered five thousand dollars damages, for which he claims judgment; and demands that the nuisance be abated, by compelling the defendants to fill up the canal.

He asserts a right to a sufficient space in front of his property, for a banquette and gutter, and pray for all relief that equity and the circumstances may require.

The defendants plead and contend, that by the 14th section of their charter, they were bound to construct a suitable draining canal on the upper side of their shelled road; that the canal they have constructed, was thus required by their charter, and necessary for the public; they specially deny the right of the plaintiff to any space for a banquette and gutter, and, generally, the danger and damage of which the plaintiff complains.

By constantly bearing in mind the article of the Civil Code quoted, and the principle to which we have alluded, the pretensions of both parties will be much abated.

The plaintiff shows the plan, which exhibits the entire front of his property, as bounded by a shelled road, and produces the deed from defendants, which calls for a front on the shelled road, and claims that the shelled road should come to his line, leaving only a space for a banquette and gutter.

The act of the Legislature, incorporating the Canal Bank, imposed upon it the obligation of constructing a levee on the upper side of the canal, and to lay out a road not less than twenty-five feet wide along the whole line of the canal, and to cover the same with sand, shells, and other hard substance, with a suitable draining canal on the upper side thereof.

Such a road having been constructed by the defendants, nothing more can be required from them under their charter. Can more be required by their plan and bill of sale? The charter required that a space of one hundred and twenty feet on each side of the canal, should be left to the State at the expiration of thirty-five years from the passage of the act of incorporation. The plan indicates that this whole space should be left open, but when taken in connection with the charter, we do not think it imposed the obligation of converting the whole of it into a shelled road. The true interpretation of the charter, plan and deed of sale, all taken together is, that a vacant space of one hundred and twenty feet between the plaintiff's property and the canal, should be left open for the purposes of commerce and public utility, and that a shelled road at least twenty five feet wide, should be left clear for a passage through this open space. They give the plaintiff a front towards the shelled road, a right of view upon, and open access to it.

It is clear from the evidence, that the defendants, in point of fact, filled up and widened the shelling of the vacant space between the plaintiff and the canal, to increase and facilitate the landing and growing commerce, and not for the purpose of a road. They had a right to use the vacant space for both purposes, as far as consistent with the rights of the plaintiff, which we will now examine.

We are of opinion, so far as the defendants are concerned, without saying anything as to the rights of the State, that the plaintiff is entitled to the space necessary for a banquette and gutter in front of his property. In laying off large portions of ground within the limits of the city into squares and streets, to be sold in lots, universal usage establishes an understanding and tacit consent, that a banquette and gutter is to be made on the vacant space left in front of the squares for streets or other access, and so marked on the plans, and the vendor can never afterwards use that space, even for public much less his individual purposes, in a manner inconsistent with the dedication for a banquette and gutter. There can be no access without a banquette; there can be no healthful cleanliness without a gutter.

The evidence establishes, that three feet are necessary for a gutter at that distance from the river, and that the banquettes, in the city, are from eight to twelve feet in width. We will adopt the medium of ten feet for the banquette, and three feet for the gutter, until the city authorities establish both by ordinance, as it is their right and duty to do.

With thirteen feet in front of the plaintiff's property, we think the defendants have no right, under their plan and sale, to claim an exclusive use, or any use, inconsistent with the municipal purposes we have mentioned.

Had the defendants the right to dig a canal twelve feet wide and five feet deep, within three feet of the plaintiff's line? They contend, that they were obliged to do so by the 14th section of their charter, which required them to make a suitable draining canal on the upper side of their levee and shelled road. They were exempted from that duty, by the 1st section of an act approved the 16th of March, 1848; moreover, a suitable draining canal at that part of their property, would be one sufficient to carry off the water coming down the street, parallel to the upper side of their shelled road, and not the canal, originally intended by the Legislature, to carry off, through the Metarie Ridge, the rain and transpiration water, from a surface fronting eight or ten miles on the Mississippi river, and extending back to the canal. It is proved, that a gutter three feet wide is sufficient for draining purposes in front of the plaintiff. The defendants were not, therefore, bound to the State to dig the canal in controversy, and by their sale and plan, we have seen, had no right to construct it for their individual purposes, at least, within thirteen feet of the plaintiff's front; no man would have purchased at their sale, without a space in front for a banquette and gutter, or, with the belief, that they might establish a nuisance within three feet or less of his door. We concur therefore with the district court in the opinion, that the canal dug by the defendants in front of the plaintiff's property, should be filled up at their expense.

We see no reason in this case for imposing vindictive damages.

The district court was of opinion, that the defendants dug the canal merely to obtain the dirt for the purpose of filling up their widened landing. The plaintiff also endeavored to prove, that it was done from the malice of an agent of the bank, against a former proprietor of the plaintiff's ground. The evidence does not sufficiently establish, to our minds, either position. On the contrary, we are inclined to think, the defendants believed they had the right to dig the canal, and that its construction might be useful. Even if it was dug for the dirt alone, to widen and fill up the landing, that improvement has and will prove beneficial to the plaintiff.

The plaintiff complains of an unnecessary elevation of the embankment and road in front of him. The Legislature required the defendants to construct a

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levee sufficient for protection from overflow, in the event of the river breaking through the levee at any point above. Engineers are of opinion, that the present height of the embankment and road, was necessary for that purpose.

The danger of the children of persons tenaning the plaintiff's house, falling into the canal with peril to their lives, is urged as a leading motive for damages. The plaintiff lives on the other side of the lake. His tenant proves there is no serious danger of the misfortunes feared.

The plaintiff greatly complains of the obstruction of the access to his premises, from the shelled road and landing. The ground, immediately in front of his property, was very low before the canal was dug. The defendants were not obliged to fill it up; so that much obstruction always existed. Half the damages allowed by the district court, would have enabled the plaintiff to have bridged his whole front, and thus to have avoided the obstructions and dangers of which he complains.

Although it is proved, that the property of the plaintiff is temporarily deteriorated in value by the canal, yet that is to be remedied by filling it up. We do not believe he wished to sell his property, for he was offered, notwithstanding the nuisance, a third more than he gave for it but two years before. The only damage he can suffer, is the temporary inconvenience of the canal, from the time he put the defendants in default by this suit, commenced in April 1851, until he can compel them to fill it up under the orders of the district court.

Suits for damages should not be matters of speculation, but reasonable claims for indemnification; and, as in this case, we believe that each party has only exercised and asserted what they believed to be their rights, we think five hundred dollars would be an ample indemnification for all the damages the plaintiff has suffered, in consequence of the errors committed by the defendants, including the trouble and expense of establishing his right to have it abated.

As to the filling up the canal at the expense of the defendants, the judgment of the district court is affirmed. The defendants are further enjoined from interfering with thirteen feet of the space in front of the plaintiff's property, the same to be reserved and subject to the disposition of the city authorities, for a banquette and gutter. The judgment for damages is reversed, and reduced to five hundred dollars, which the defendants are condemned to pay, with costs in the district court; and it is decreed, that the plaintiff pay the costs of the appeal.

### MARY C. NICHOLS v. HER HUSBAND.

The wife, separated from bed and board, has no need, in any case, of the authorization of her husband. She may make all contracts not prohibited to her, as if she were unmarried. It is, therefore, perfectly competent for her to make a compromise with her husband respecting the property which each party is to retain.

**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Eggleston*, for plaintiff. *Cohen, and Benjamin and Micou*, for defendant.

By the court:

Rost, J. By the judgment which decreed a separation from bed and board between the plaintiff and the defendant, the parties were referred to a notary to make a partition of the community property; but, instead of going through all the

forms of a judicial partition, they made a compromise, by which each of the parties retained a portion of their property, and renounced their rights on the other portion. NICHOLS  
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The plaintiff sues to avoid this compromise, on the ground of error and fraud, alleging that her husband concealed from her a large portion of the property of the community, and she was induced, by that artifice, to compromise as she did. She called upon her husband to answer interrogatories, and, among others, whether the property embraced in the act of compromise contained all the community property; the answer was: "It does, every fraction."

There is no evidence in the record beyond the answers of the plaintiff to the interrogatories, and the judgment of the district court upon them was, that the rights of the parties be considered as settled by the former judgment and act of compromise. The plaintiff has appealed.

The ground of fraud upon which alone the action rests, is conclusively disproved, but the want of capacity of the plaintiff to make a compromise with her husband in such a case as this, is urged, for the first time on the appeal, as a sufficient ground for the reversal of the judgment.

The irregularity of this mode of proceeding is obvious; but this objection to it may be waived in this instance, the ground taken being clearly untenable.

The woman, separated from bed and board, has no need in any case of the authorization of her husband. See acts 1826, p. 162, sec. 2. She may make all contracts not prohibited to her, as if she were unmarried. The contract entered into in this case, so far from being one of those prohibited, is expressly authorized. Art. 2421 of our Code is a literal copy of art. 1595 of the Napoleon Code; and here, as in France, the first paragraph of that article which authorizes one of the spouses to make a transfer of property to the other who is judicially separated from him or her, in payment of his or her rights, includes community right. See Toullier, vol. 2, tit. 6, No. 675. Ibid. vol. 13, tit. 5, No. 19.

Under art. 1304 of the Code, the rules for the partitions of successions, with the exception of that which relates to collation, are applicable to partitions of community property, whether the community has been dissolved by death or by judicial separation; and the first of those rules is, that when all the parties are of age, and present, or represented, the partition may be made in such form and by such an act as the parties interested agree upon. C. C. 1245.

The form of settlement adopted by the parties, was authorized by law, and as the good faith of the defendant in making it has not been successfully impeached, the judgment must be affirmed.

Judgment affirmed, the appellant paying the costs of this appeal.

## GEO. A. BOTTS and T. C. POOLE v. R. F. NICHOLS & Co.

In a contest for the ownership of slaves, the plaintiff's title was sustained. He died, and his curators brought suit for the wages of the slaves, and also for the value of those that were not delivered. Plaintiffs had judgment, which, on appeal, was affirmed.

Slaves were delivered to defendants on their giving a forthcoming bond. *Held*: That this circumstance did not affect defendants' rights in relation to the slaves.

**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan, J.*  
*Gould and T. H. Howard*, for plaintiffs. *M. M. Cohen and John R.*  
*Grymes*, for the defendants. By the court:

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EUSTIS, C. J. Certain slaves were seized under a writ of attachment against *John S. Caldwell*, an absconding debtor, as his property, and subject to the payment of his debts. They were claimed by the defendants as their property. Their title was an act of sale from *Caldwell* to them. The court of the first instance gave judgment in favor of the attaching creditor. On an appeal to this court the judgment was affirmed, this court being of opinion that the act of sale under which the slaves were claimed by *Nichols & Co.*, was a false simulation. *Caldwell* has since died, and the plaintiffs are the curators of his succession, and have brought this suit to recover from the defendants wages for the slaves during the time they were in their possession, and the value of two of them, which the defendants had failed to deliver to them.

The district judge gave the plaintiffs judgment for \$1260, the value of the two slaves, and the sum of eighty three dollars per month for the hire of the slaves for the eleven months claimed in the petition. The defendant has appealed.

Under the decision of this court, on the defendants' title, it is clear that they have no right to retain the fruits of the labor of the slaves which did not belong to them. After the slaves were attached, they were delivered to the present defendants, on their executing a forthcoming bond. We do not perceive that this circumstance affects in any manner their rights in relation to the slaves.

The plaintiffs have asked for an amendment of the judgment, in their favor, allowing the sum of fourteen hundred dollars for the value of the two slaves, in lieu of the sum of \$1260, at which the district judge estimated them.

They were wrongfully sold by the defendants, pending the suit in which they were attached. But the evidence is not of that character, as to their value, which would authorize us in changing the judgment of the district court in this respect.

The judgment of the district court is therefore affirmed, with costs.

### HEIRS OF CATHARINE SHARP v. ANDREW KLIENPETER.

The words "lawful heirs," in a will, refer to heirs of the half as well as of the whole blood, and evidence cannot be received to show that testatrix only meant a portion of her heirs at law. The admission of such evidence would virtually defeat the prohibition to make verbal testaments.

An executor, who is the debtor of the succession on account of the purchase of productive property from the testator, owes legal interest on the installments from their maturity. But his failure to pay the debt, which he owes, does not subject him to the penalties of the law for not keeping the funds of the succession in a bank.

**A** PPEAL from the late Probate Court, now Sixth Judicial District Court, parish of East Baton Rouge, *Burk, J. Cyrus Ratliff*, for plaintiffs, cited : *Bullard and Curry's Digest*, p. 2, 3, Act of 13th of March, 1837. 2 Ann. 400. 4 Ann. 29, 30 ; and the case of the *Succession of Salvador Christy*, 6 Ann. 427, the last case on this point reported, where the court say, the act of 13th March, 1837, requiring syndics, executors, curators, &c., to deposit funds in their hands in one of the banks allowing interest on deposits, is not unconstitutional ; and such fiduciaries are not excused from the penalty imposed by the law, upon the grounds that there were no banks which paid interest on deposits. If this case does not bear us out in our motion, then I yield the point.

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We will not trouble the court with any argument to refute the position taken by the counsel for the executor, that *Mrs. Smith* labored under an error of law in making her will; that she believed that her lawful heirs were her sisters and brothers of the full blood. The words lawful heirs is a plain and unambiguous expression, and cannot be departed from. C. C. 882, 884, 885. 6 Ann. 232. See, as to the interpretation of acts of last will, C. C. 1705. But the will must stand as it is, or be set aside. If set aside, so much the better for the legal heirs.

*J. M. Elam*, for defendant. As to the plaintiffs' complaint, whether heirs of the full blood are entitled to three-fourths or two-thirds of the estate. Art. C. C. 909, requires that: "If they are of different marriages, the succession is equally divided between the paternal and maternal lines of the deceased; the german brothers and sisters take part in the two lines, the paternal and maternal brothers and sisters each in their respective lines only."

We have viewed this question as if the article 909 established clearly in such a case as this, the right of the half blood to inherit. By the Old Code this right was denied. In effecting this innovation in the New Code, article 909, the jurist, in a note appended to the project, remarks: "The 38th article of our code makes the german brothers and sisters of the deceased, inherit the whole of his succession to the exclusion of paternal or maternal brothers and sisters, which appears to us unjust; for the paternal and maternal brothers and sisters, though not so intimately connected with the deceased as his german brothers and sisters, are no less his brothers and sisters, and ought to have some part of his succession."

The 40th article of the code, in the case in which the deceased has left no german brothers and sisters, but only paternal or maternal brothers or sisters, has established a complicated mode of partition, which is found in Law 586 of the Partida, tit. 13, and in the Febrero Real, book 3, tit. 6, Law 13, which presents great difficulty.

We have thought the mode which we propose, which is taken from art. 752 of the French Code, is more simple, and grants every thing which is required by the double tie which unites german brothers and sisters, without sacrificing the rights of the paternal brothers and sisters in the article mentioned.

There appears to be in art. 909, C. C. and art. 752, French Code, a qualified exception to the disposition of such an estate, in these words: "If there are brothers and sisters on one side only, they succeed to the whole, to the exclusion of all the other relations of the other line."

German brothers and sisters may have both paternal and maternal brothers and sisters of the half blood: as for example, when a widower, with children, marries a widow with children, the issue of their marriage would be bound as by a "double tie" to the half blood by the paternal and maternal line, although the children of the two lines respectively, are strangers in blood. It seems to us that it is only in such a case, that german brothers and sisters are required to divide an inheritance; but, in a case like that at bar, where there are sisters on one side only, they should succeed to the whole estate to the exclusion of all the other relations of the other line. It is evident the article intended to exclude some one under certain circumstances, and we frankly confess our inability to discover who was intended to be excluded, unless it be in a case where the "double tie" did not exist, but only in a case where the half blood existed in one line only.

If, under article 909, the half blood be entitled to any part of the inheritance, the judgment of the district court did them ample justice.

The demand of those claiming to be heirs of the half blood should be rejected. This depends on the construction to be given to the intention of the testatrix, as her oft-expressed wish, shown by the answers of the executor to interrogatories propounded to him, and the testimony of *James C. Dawson* and *John B. Kleinpeter*, taken on the trial. In fine, whether the right claimed by the half blood does not grow out of an error of law, operating on the mind of the testatrix, when in her will she said: "It is my will, that the balance of my property, both real and personal, and debts due to me, shall be equally divided between my lawful heirs."

Who did the testatrix consider were her lawful heirs?

By the Code of 1808, the half blood was not lawful heirs, *ab intestato*, in case there were german brothers and sisters. This rule of inheritance being known

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to the ancient population, a change by the Code of 1825 is still unknown to many of them, as it doubtless was with the testatrix, at the date of her will and her death.

But the question occurs, can the heirs of the full blood plead an error of law resting on the mind of the testatrix when her will was dictated, as to those who were her "lawful heirs?"

The jurist who revised and projected the Code of 1825, which gave the half blood a right to inherit, also incorporated in the code, tit. 4, c. 2, sec. 1, par. 7, article 1840, Errors of Law.

In a note appended by the jurist who revised and recommended for adoption the Code of 1825, it is said: "As there has been much diversity of opinion, and many contradictory decisions on the effect which errors in law ought to have upon contracts, we have thought it proper to offer some positive enactments on the subject. Neither the Napoleon Code, nor that in force in this State, have any article on that subject *eo nomine*, but we think there are some in both codes which show a decided intent that such errors, as well as errors in fact, should invalidate contracts. The article 1109, which is copied verbatim in our Code, (art. 9, title obligations,) declares, "that is no valid contract which is given through error," without making any distinction between error in law and error in fact. Art. 2052 Napoleon Code, and art. 10, title Transaction (Compromise) in our Digest, both provide that a compromise shall not be attacked for an error in law. Now, there being no such objection in any other contract, it is fair to conclude that the general expression of the article 9 would have given rise to a rescision of all contracts, including those of compromise, or there would have been no reason for the special restriction.

The reason of allowing a rescision for errors of law, appears to us equally evident in both cases. Our code, and that of most other nations, has established, that when an obligation is entered into without a cause, or with a false or unlawful cause, it is void. Art. 31, tit. Obligation. If, therefore, an opinion of my right is the sole cause of my agreement, and that opinion is false, there is then no cause, no more than there would be if the error bore on the substantial fact, which was the cause of the contract, and of course the contract is void. Our opinion on this subject is supported by D'Aguesseau in his treatise on the subject, Pothier in his Pandects, vol. 1, p. 645, Domat, law 1, tit. 18, No. 14, Vennius, Huberus and other celebrated civilians, and by several learned writers in the English law. The maxim that all are presumed to know the law, we apprehend, applies principally to duties, not to contracts. But a few of the 3522 articles of our code are enactments of positive law. The capacities and incapacities of persons being defined, declaring what acts may or may not be contrary to good morals and public order, persons are left free to make their agreements, legally entered into, to have the effect of laws. The code is principally illustrative of principles which should be implied in every contract, influenced by the perpetual disposition to render every man his due.

By the court:

ROSE, J. This is a suit by the heirs of *Mary B. Sharpe*, some of whom are descendants of brothers and sisters of the whole blood, and others are descendants of brothers and sisters of the half blood of the deceased, against her executor, to compel him to account for, and distribute among them, the funds in his hands.

The executor rendered his account, showing a balance of \$15,760 86 in favor of the succession, after paying the debts and particular legacies. He averred, at the same time, that he was one of the heirs of the whole blood, and denied the right of the descendants of the brothers and sisters of the half blood to inherit any portion of the succession.

The district judge homologated the account of the executor, and ordered him to pay three-fourths of the amount in his hands, to the heirs of the whole blood, and the other fourth to the heirs of the half blood. He allowed legal interest on that balance, from the judicial demand, instead of the interest of 20 per cent claimed by the plaintiffs, on the ground that the executor failed to deposit the funds of the succession in bank, as required by the act of 1837.



The plaintiffs have all appealed, and the executor has asked that the judgment be amended, so as to reject the demand of the heirs of the half blood, and the allowance against him of legal interest.

As all the heirs of the whole blood, except the defendant, have joined in the same suit with the heirs of the half blood to claim the succession as heirs at law, and have set up no claim under the will of *Mary B. Sharpe*, the district judge properly ordered the distribution between both classes of heirs to be made in conformity with article 909 of the code, and the executor has no capacity to contest, in behalf of the heirs of the whole blood, claims which they have judicially admitted.

The executor being himself an heir both at law and under the will, had undoubtedly the right to claim, as testamentary heir, and to contest the rights of any of the plaintiffs as heirs at law; but he has not done so, he simply alleges that he is one of the heirs of the full blood, and denies that the heirs of the half blood are entitled to inherit any portion of the succession; the will is nowhere mentioned by him, and his rights, as heir at law, being fully recognized by the judgment, he has no cause of complaint.

The question, who the testatrix meant by her lawful heirs, when she ordered her property to be equally divided between them, does not occur, and if it did the result would certainly not be favorable to the appellee. The words lawful heirs are free from ambiguity, and no evidence was admissible to prove that she only meant a portion of her heirs at law; that evidence would virtually defeat the prohibition to make verbal testaments.

The executor having purchased property from the deceased, and being a debtor of the succession for the price of it, to the entire amount remaining in his hands when the motion to produce his bank book was made, we think that the Act of 1837 is not applicable to him, but the property which he purchased being productive, we are of opinion that he should have been charged with legal interest from the maturity of the different installments of his debt.

The plaintiffs object to the charge of \$1500 made by the executor, for a like sum paid by the testatrix to *D. Smith*, in April, 1839; he was the agent of the testatrix, and had the sole management of the plantation which he purchased from her shortly after; he has charged himself, in his account, with the proceeds of the cotton crop of 1838, and, as it may be fairly inferred from the evidence that she had no other means besides the crop to pay that sum, we cannot say that the district judge erred in deducting it from the proceeds of the crop.

The allowance of interest from the maturity of the installments, and the neglect of counsel to submit a decree, showing the share of each of the parties by represent, after deducting the amounts they have received, makes it necessary to reverse the judgment and to remand the case. That interest will increase the balance against the executor in his account from \$15,760 to \$15,528 40, to be distributed as follows: three-fourths to the heirs of the whole blood, and one-fourth to the heirs of the half blood.

It is therefore ordered, that the judgment be reversed. It is further ordered, that the executor distribute among the heirs of the half blood, the sum of \$92 12. It is further ordered, that he account to the heirs of the whole blood, for sixteen thousand one hundred and forty seven dollars thirty-six cents, deducting from their respective shares the amount paid each of them, with legal interest from the date of payment to this day. It is further ordered, that the account of the executor, as amended, be approved and homologated, and the

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case remanded for a partition among the heirs, in conformity with this decree, and with directions to the district judge to allow legal interest from this date upon half of the amounts coming to them on the final partition. It is further ordered, that the costs of this appeal be paid by *Andrew Kleinpeter* personally.

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### CORCORAN v. RIDDELL.

The return of a citation of the husband, which shows a service made upon the wife, without stating that the husband was absent from his domicile, is defective. The fact of absence must appear from the return, unaided by other evidence.

The vendor of a judgment, who stipulates against any recourse or claim whatsoever against him, is not relieved from the implied warranty of the existence of the debt at the time of the transfer, in the form in which it purported to exist, that is to say, in the form of a judgment.

Even in case of stipulation of no warranty, the seller, in case of eviction, is liable for a restitution of the price, unless the buyer was aware at the time of the sale of the danger of eviction, and purchased at his peril; and this principle of the contract of sale, applies not only to the sale of corporeal things, but also to the sale of a debt.

Where the seller is in good faith, and the purchaser is evicted of the thing bought, the measure of damages against the former, is the restitution of the price and the costs of the action under which he was evicted.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Warfield*, for plaintiff. *Bartlette*, for defendant. *Pitot*, for the *Citizens' Bank*, called in warranty.

By the court:\*

**SLIDELL, J.** The district judge did not err in adjudging the nullity of the judgment rendered in favor of the *Citizens' Bank v. Corcoran*. The validity of that judgment depends upon the return of service of citation, unaided by other evidence. The return is defective, for it shows a service made upon *Corcoran's* wife, without stating that he was absent from his domicile at the time of service. The code allows a service by delivering the citation to a free person, apparently above the age of fourteen years, living in the house when the defendant is absent. 189 C. P. The fact of absence must appear. *Oakey v. Drummond*, 4 Ann. 363. *Kendrick v. Kendrick*, 19 L. R. 38.

When this suit was brought against *Riddell* to annul the judgment, he called in warranty the *Citizens' Bank*, from whom he purchased, and prayed, that in case it should be decided that the judgment against *Corcoran* was null, the bank should be condemned to pay him its amount, with interest and costs; and also prayed for general relief.

It appears that the bank obtained a judgment against *Whalin* and *Corcoran* on sundry notes made by *Whalin*, for the payment of which *Corcoran* was as to have bound himself. This judgment the bank assigned to *Riddell*, for a price in cash equal to about one-tenth of its amount, by a written transfer, in which was stated that the assignment was made without any recourse or claim whatsoever against the vendor. The district judge was of opinion that, under the agreement, the defendant took on himself all the risk of the speculation, and had no right to look to the bank for reimbursement. There being no evidence of

\* *Preston, J.*, declined sitting in this case, being a stockholder in the *Citizens' Bank*.

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additional agreement, the liability of the bank rests solely upon the written contract, and, we are of opinion, that the district judge erred in its interpretation. It unquestionably relieved the bank from any guarantee of the solvency of the debtors, but not from the implied warranty of the existence of the debt at the time of the transfer, in the form in which it purported to exist, that is to say, in the form of a judgment. It turns out that the judgment had no legal existence. Thus, the indebtedness of *Corcoran*, supposing it to exist at all, of which we have no evidence, exists in a form less advantageous to the purchaser. He has not the right of issuing execution against *Corcoran*, nor the means of obtaining a judicial mortgage upon his property; and the indebtedness of *Corcoran* is as matter in *pais* and disputable, instead of being *res judicata*. If we were permitted to interpret the language of the contract by the mere standard of common parlance, considered in connection with the lowness of price, we might perhaps say, that any warranty whatever was excluded. But the code is very stringent on this point, and has expressly provided that, even in case of stipulation of no warranty, the seller, in case of eviction, is liable to a restitution of the price, unless the buyer was aware, at the time of the sale, of the danger of the eviction, and purchased at his peril and risk. This principle of the contract of sale, applies not only to the sale of corporeal things, but also to the sale of a debt. See Civil Code 2616. Troplong No. 935, 936, 937. Merlin *verbo* Garantie des creances. *Toler v. Swayze*, 2 Ann. 881.

We are of opinion, therefore, that the district judge erred in giving judgment in favor of the bank, and thus throwing upon *Riddell* the costs of the action of nullity.

We are clearly of opinion that *Riddell* was not entitled, under the terms of the sale, to recover from the bank the whole amount of the debt purchased by him at one-tenth of its face. The bank was in good faith; and the true equity between buyer and seller, in a case of this sort, is, clearly, that neither should be enriched by the transaction, if it be rescinded. The recourse of *Riddell* must be limited to an indemnity for the costs of this action and to the restitution of the price. If there had been a formal prayer for the rescision of the sale, so as to have presented a distinct issue as to his right to such relief, we would have accorded to it, under the evidence before us. But, as the case is presented, it is more equitable to leave the matter open, relieving him only to the extent to which he was clearly entitled. Indeed, as the cause has been conducted, it does not appear whether *Riddell* desired to annul the sale, or whether the bank might not have assented to the rescision, if asked; for, it will be observed that the validity of the judgment against *Whalin* is undisputed.

It is therefore decreed, that the judgment of the district court, so far as it annuls the judgment against *Corcoran*, be affirmed; that, in other respects, it be reversed; that all the costs of suit in the court below, and those of this appeal, be paid by the *Citizens' Bank*, and that the right of *Riddell* to sue for a rescision of the sale, be reserved.

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### RICULFI & Co. v. DELACROIX & Co.

An assignment made by an insolvent, which stipulates for an absolute discharge of the assignor, and excludes all those creditors who would not sign such discharge from any participation in the dividends, is null.

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**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Bouney*, for plaintiff. *L. Janin*, for defendant. By the court :

SLIDELL, J. This appeal comes before us upon a confused and imperfect record. An examination of the case, under such circumstances, has not satisfied us that the appellants are entitled to a reversal of the judgment, or that injustice has been done.

We are clearly of opinion, that the assignment made by *Fuselier*, who was insolvent, which a portion of his creditors accepted, and under which *Blanchard* and *Rochereau* were appointed agents or assignees, was illegal on its face, inasmuch as it stipulated for an absolute discharge of the assignor, and excluded all those who would not sign such discharge, from any participation in the dividends. The assignees, and others, may have acted with good motives, with a belief that the assignment was best for all concerned, and in a natural spirit of indulgence to a very young man, who seems to have been the victim of the faults of others, and his own inexperience. But the assignment was in manifest violation of the wise policy of our laws, and cannot be sustained against the plaintiffs, lawful creditors at the date of its execution.

The confession of judgment in favor of *Rochereau et al.*, was illegally obtained, as against the plaintiffs. The point of non-joinder of the persons associated with the appellants, *Rochereau* and *Blanchard*, in that judgment, appears to us to come too late.

Judgment affirmed, with costs.

### MUNICIPALITY NO. THREE v. THE LEVEE STEAM COTTON PRESS COMPANY.

The acceptance of a dedication to the public, implied from *user*, is a deviation from the civil law proper, forced, as it were, upon courts, by the necessities of the country, and resting purely upon precedent. But when the dedication rests upon the naked acceptance for the public, whoever accepts must be clothed with the authority of the sovereign, or the acceptance is not binding.

The right to establish public places and to change their destination, is an attribute of sovereignty which the Legislature may delegate to corporations. The Legislature of Louisiana has delegated this power to the city of New Orleans, without reservation; under the grant, it is competent for the city government to accept a dedication of public streets, and equally competent for it to annul the acceptance before the streets have been opened, provided no vested right, acquired under the dedication, is affected by the change.

**A** PPEAL from the Second District Court of New Orleans, *Lea, J. Roselius*, for plaintiffs.

*L. Janin*, for defendant. If the dedication was only inchoate, not followed by use, the council had undoubtedly the right to renounce it with the consent of the owner of the land, no rights being as yet vested in any one under the dedication. When a street has been laid out by a proprietor and accepted by the council, can it be pretended, that while it was still unopened and existed only on paper, and before any sales had been made of the property, the council could not, with the consent of the proprietor, alter its direction, if they found another direction more useful to the public? To deny this right, would be declaring, that municipal corporations have power to do harm, and that they are powerless to do good, and that they cannot correct their own errors, however palpable they might be, and though no one could be injured by the correction.

By the court :

Rost, J. The plaintiffs sue for the purpose of compelling the defendants to open, at their own expense and charge, certain streets, through the property over which the buildings and machinery of the cotton press are erected. The facts of the case are stated as follows, by the district judge in his opinion :

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COMPANY.

"In May 1831, *Madame Lalaurie* addressed a letter to the City Council of New Orleans, asking their approval of a plan, in accordance with which she proposed to convert a portion of rural property into urban property; a copy of this plan is annexed to the petition. On the 10th May, 1831, the council approved of the plan, and granted the requisite permission to open the streets designated therein. The plan appears to have been deposited in the archives of the municipality. On the 18th July, 1831, *Madame Lalaurie* again addressed a letter to the council, stating, that inasmuch as she had not been able to carry out her intention of converting her property into a faubourg, she requested that they would consider the proposition as not having been made, "de consider comme non avenue la demande que je lui avais faite pour être autorisée à établir le faubourg Delphine." She also asked that they would pass a resolution to annul their previous action on the subject, in order that she might be able to dispose of her property to better advantage. This letter was acted upon, on the 22d of July, 1831. The council repealed the resolution of the 10th May, 1831, and authorized her to withdraw her plan, which was accordingly done. On the 26th July, 1831, the whole of the property designated on the plan, including three lots which had been sold to *Rabourn* and *Lefort*, were purchased by the defendants."

On the 10th April, 1833, the President of the Cotton Press Company, presented a plan of division of their property (being the same which they had purchased of *Madame Lalaurie*) to the council. This plan was approved and adopted, and the faubourg was laid off in accordance therewith. By this last plan, the spaces which the plaintiffs claim as public streets, were reserved for the cotton press; they had previously been built upon by the defendants, and have been in their private possession and use ever since.

On those facts, the main question which the case presents is, whether the city council could surrender the right to the opening of the streets represented in the first plan, as running through the property of the defendants? The appeal is prosecuted by the municipality, from a judgment recognizing that right.

It is not pretended that the streets were ever opened or used by the public, and it is conceded, that as soon as the ordinance, revoking the acceptance of the offer of *Madame Lalaurie*, was passed, the defendants purchased the property, and were permitted to erect upon it costly buildings and machinery, the removal of which over the places claimed for streets, would cause them an injury of \$30,000, besides destroying the usefulness of the property as a cotton press. But the plaintiffs contend, that the presentation of the plan was an offer to dedicate the streets to the public; that the approval of it by the municipality, is an express acceptance of the dedication, and that the dedication once made and accepted, could not be annulled by any subsequent act of the parties, but must remain in force, until the destination of the property is changed by the sovereign power of the State.

The rule that things *ultra commercium*, can only be brought back into commerce by the act of the sovereign, is the corollary of that elementary principle of the civil law, that the sovereign alone is competent to place things, which are in commerce *ultra commercium*, and the appellants are placed in the dilemma

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that if the dedication was not revoked by the second ordinance, for want of power in the city council, it was not, for the same reason, legally accepted by the first ordinance.

The acceptance of a dedication to the public, implied from *user*, is a deviation from the principle of the civil law, forced, as it were, upon courts by the necessities of the country, and resting purely on precedent; but when, as in this case, the dedication rests upon the naked acceptance for the public, whoever accepts must be clothed with the authority of the sovereign, or the acceptance is not binding.

The right to establish public places and to change their destination, is, like that of levying taxes, one of the attributes of sovereignty; both are vested in the Legislature by the Constitution, and it may delegate part of those powers to corporations or individuals, if, in its opinion, the public interest requires it. Thus the power of taxation has been delegated to police juries, municipal corporations, school directors and others.

The power of opening, widening and continuing streets, was, in like manner, delegated to this city by the 19th section of the act of incorporation, and, under it, the plaintiffs had clearly the right to accept the streets offered by *Madame Lalaurie* through her property.

This delegation of power is made without any reservation, and the city government can do, under it, all that the Legislature has a right to do, in the opening of new streets; it represents not only the city, but the public at large, and may revoke ordinances establishing new streets, until they are opened, if, in the exercise of its discretion, it ascertains that the opening of them would be injurious to the public interest; provided, however, that no vested right acquired under the dedication, is affected by the change.

There is another consideration dwelt upon by the district judge, which cannot fail to have great weight with all just men. It is, that the plaintiffs accepted the new plan offered by the defendants; encouraged them to build and enlarge their cotton press, and that they and the public have slept twenty years upon their pretended right; the equity as well as the law of the case, is against them.

Judgment is affirmed, with costs.

### TAYLOR AND HADDEN v. B. L. JOOR.

It is the settled jurisprudence of the United States, that the plea of a statute of limitation to an action on a judgment rendered in another State, is a plea to the remedy, and, therefore, the *lex fori* must govern. There is nothing in the Constitution of the United States, or laws under it, to justify an exception to the rule.

**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. A. N. Ogden*, for plaintiffs. *J. H. Van Dalson*, for defendant. By the court:

**EUSTIS, C. J.** This suit was commenced, by attachment, for the recovery of the amount of a judgment rendered against the defendant in the Circuit Court of Wilkinson County, in the State of Mississippi, on the 14th of October, 1842. There was judgment in the district court for the plaintiffs, and the defendant has appealed.

The defence was a plea of prescription; and the district judge held the term of prescription of the law of Louisiana, to be exclusively applicable to the case.

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We have recently considered this subject, in the case of *Bacon et al. v. Dahlgreen*, and we then held, under the Code of Practice, art. 13, and the well established jurisprudence, that the prescription of the forum, or of the place where the remedy is sought, must govern in all suits for the recovery of debts.

The principal ground on which a reversal of this judgment is sought is, that the Constitution of the United States excepts judgments rendered in courts of the States, from the operation of this general rule. We do not so understand the operation of the Constitution and Laws of the United States, which relate to the effect of judgments. By virtue of their provisions, a judgment, rendered in other States, is put on the footing of a domestic judgment, by which is meant, not that it has the force and effect of a domestic judgment beyond the jurisdiction declaring it to be a judgment, but a domestic judgment as to the subject matter of the suit; and, if it is conclusive in the State where it is pronounced, it is equally conclusive in other States.

It is the settled jurisprudence of the United States, that the plea of a statute of limitations, to an action on a judgment rendered in another State, is a plea to the remedy, and therefore the *lex fori* must govern. *McElroy v. Cohen*, 13 Peters, 327.

The statute of the State of Mississippi, relied upon by the defendant, provides, that no judgment rendered in the courts of that State shall be revived by *scire facias*; and that no action of debt shall be instituted thereon after the expiration of seven years from the date thereof; nor shall any execution issue thereon after seven years from the time the last execution issued on said judgment.

This is a statute of limitation by its very terms, and is so considered in the courts of that State; and it is not a valid plea to the plaintiffs' action.

The judgment of the district court is therefore affirmed, with costs.

### THE STATE OF LOUISIANA v. JAMES CASSIDY.

*Charles Ford* gave a bond, with *James Cassidy* as his surety, in the sum of \$1000, conditioned, that he should appear before the First District Court, to answer a charge of larceny, and not depart without leave of the court. The clerk issued a notice, stating that, on a certain day, the party to the appearance bond was called, but failed to appear; that the surety was called upon to produce him, but failed to do so; that the bond was therefore forfeited, and judgment entered against the surety. It was held, that this was a sufficient notice under the act of the 11th of March, 1837.

The party to such a bond should, if there be legal grounds, make an application to the court to set aside the judgment rendered upon it, within ten days after the notification thereof. If such application be overruled, he is allowed ten days, from the judgment overruling his application, for a suspensive appeal; and if he make no such application, he is allowed a suspensive appeal within ten days from the notification of the judgment. If no such appeal be taken within the periods stated, he is entitled to a devolutive appeal only.

Where it does not appear by the petition for a writ of prohibition, that the sheriff was about to sell the property seized, before the final disposition of the injunction suit, [the object of which was to restrain him from executing the judgment, but merely that he was about to close up the house seized, the writ will not be granted.

Although the statute provides, as the condition of the bond, that the accused shall appear, yet that means an effectual appearance, that is, that the party shall remain and submit to trial. Where, therefore, the bond which the accused and his surety signed, expressed on its face, that the accused shall be and appear before the First District Court of New Orleans,

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|----|------|
| 7  | 271  |
| 14 | 807  |
| 7  | 273  |
| 45 | 1397 |
| 7  | 273  |
| 46 | 550  |
| 7  | 273  |
| 48 | 1020 |
| 49 | 1569 |

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and not depart thence without leave of the court, to answer to the complaint brought against him for larceny, it was held, that such a condition was not more onerous than that which the spirit of the statute imposed.

**A** PPEAL from the First District Court of New Orleans, *Larue, J. T. H. Howard*, for appellant. *Isaac Johnson*, Attorney General, for appellee. On an application for a writ of prohibition.\* By the court:

PRESTON, J. On the 20th of June, 1850, a judgment for \$1000 was rendered by the First District Court, against *James Cassidy*, as the surety of *Charles Ford*, on a bond conditioned for his appearance before the court to answer a charge of larceny preferred against him by the district attorney, in that court. Ten days' notice of the judgment was given to him, in pursuance of the act of the 11th of March, 1837; he did not cause it to be set aside for any of the reasons or by the means specified in the act, and on the 2d of July, 1850, the judgment was signed. Sometime afterwards, though the date does not appear, execution was issued against him upon the judgment, and the sheriff, under the directions of the district attorney, proceeded to seize his property. On the 28th of April, 1851, and we suppose sometime after the execution was issued, he took an appeal from the judgment.

It appears, moreover, by his petition to this court, for a writ of prohibition against the execution of the judgment, that he obtained an injunction against the further execution of the judgment. The injunction was dissolved, and he took a suspensive appeal from the judgment by which it was dissolved. He then applied to the district court for an order to restrain the sheriff from shutting up the house he had seized, on account of the appeals he had taken in the case. The district court refused to grant the application, on the ground, that the appeal from the judgment of forfeiture of his bond, was a devolutive, and not a suspensive appeal. He now applies to this court for a writ of prohibition, to restrain the district court and sheriff from proceeding under the execution.

The applicant has placed before us, the record of the appeal from the judgment of forfeiture before us, by which the dates appear; and that judgment was rendered the 20th of June, 1850, and that the appeal was taken only on the 28th of April, 1851. The date of the execution does not appear, but we presume it was long after the notice of judgment. The appeal was devolutive, and not suspensive, because taken more than ten days after the judgment and notice of the same.

It is urged, however, by the applicant, that a copy of the judgment, after being signed, should have been served upon him. The third section of the act of the 11th of March, 1837, prescribes, that it shall be the duty of the clerks of the several district courts out of the city of New Orleans, and of the criminal court, to issue notices of such judgments to the parties concerned, as in ordinary civil cases, and on service and return thereof, after the usual delay, to issue executions on all such judgments, which it is made the duty of the several sheriffs throughout the State, to execute without delay." Bullard and Curry's Dig. 281-2.

A notice was issued by the clerk, stating that, on a certain day, the party to the appearance bond was called, but failed to appear; that the surety was called upon to produce him, but failed to do so; that the bond was thereupon forfeited, and judgment entered against the surety for a thousand dollars. This is the

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\**Eustis, C. J.*, was absent when the application for a writ of prohibition was before the court.



notice which has always been given in such cases, and we think fully complies with the letter and spirit of the law.

After this notice of the judgment, there were various means and reasons, specified in the 1st and 2d sections of the act, for which it might be set aside, on application within ten days, and if the party was not possessed of any of these means of relief, or did not resort to them, it has been understood, especially since the allowance of appeals in criminal cases, that he might seek relief, within those ten days, by a suspensive appeal; but that if the appeal was not taken within the ten days, it would be only a devolutive appeal. If he had made a formal application to set aside the judgment within the ten days, no doubt ten additional days would have been allowed to appeal, after it was overruled. This is a reasonable construction of the law, especially as promptness in the disposition of criminal cases, and matters connected with them, is so indispensable to the welfare of society.

The suit for an injunction, the judgment disallowing it, and the appeal from that judgment, are not before us, and we cannot say, therefore, that those proceedings justify the application for a prohibition. The injunction could only maintain things in *statu quo*, until its final determination. Now, it does not appear by the petition for a writ of prohibition, that the sheriff was about to sell the property seized before the final disposition of the injunction suit, but merely that he was about to close up the house seized, which he might do for the purpose of keeping and preserving it under his seizure, until the injunction suit should be finally terminated. We could not legally restrain him from doing so, as he is accountable for the proper preservation of the things seized by him.

In the record of appeal from the judgment of forfeiture, we have examined the assignments of errors, and, as at present advised, do not think them well founded. This is an additional reason for refusing to grant a writ of prohibition, though we will not express a positive opinion on the appeal, until it is regularly tried.

The application for a writ of prohibition, is therefore dismissed, at the costs of the applicant.

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#### SAME CASE—ON THE MERITS.

PRESTON, J. On the 29th of May, 1850, *James Cassidy* entered into a bond to the State as the surety of one *Ford*, accused of larceny, that he should appear and answer to the charge before the First District Court of New Orleans, and not depart without the leave of the court. He was arraigned, plead not guilty, and put himself on the country for trial. But, on the 20th of June, the day fixed for the trial, though duly notified, he did not appear. A *capias* was issued, but he was not arrested, nor ever afterwards appeared.

On the 2d of July, 1850, in pursuance of the act approved the 11th of March 1837, on motion of the district attorney, the bond was declared forfeited, and judgment entered against *Ford* and *Cassidy*, *in solido*, for its amount and costs. In pursuance of the act, ten days' notice was given to *Cassidy* to set aside the judgment, if he had any cause. A like notice was issued to *Ford*, but he was not found.

*Cassidy* did not attempt to set aside the judgment in the district court, but, on the 28th of April, 1851, took this appeal.

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He assigns for error, that no notice was given to the accused to appear and stand his trial; that the notice, if given, must have been a written notice, emanating from the clerk's office, served by the sheriff, and his return on file, and that there is nothing in the record showing such notice. The statutes do not prescribe in what form the notice shall be given, and the rules of the court are not before us. In their absence, we should suppose, that an oral notice of the day of trial, when the prisoner was arraigned, would have been sufficient. On the day of trial, an entry is made that the accused did not appear for trial, though duly notified. We are at least to presume, that he was duly notified, since the defendant did not make the objection within the ten days allowed by law for doing so.

He assigns in the next place for error, that the condition of the bond was, that the accused should appear in court when notified. He did appear and pleaded to the information filed. The law of 1837, only authorized a forfeiture of the bond and judgment on it, when the accused failed to appear on the day named; leaving to the State recourse by ordinary action only, for any subsequent failure, to abide by the decision of the court. The bond was therefore improperly forfeited, and judgment rendered against the surety, without observing the due forms of law, and contrary to law and the Constitution of the State and of the United States.

The condition of the bond in this case, as expressed on its face, is, that the accused shall be and appear before the First District Court of New Orleans, to answer to the complaint brought against him for larceny, and not depart thence without the leave of the court. It is true, the statutes provide, as the condition of the bond only, that the accused shall appear; but that means an effectual appearance; and that effectual appearance is, that the party shall remain and submit to trial and judgment. The condition expressed in the bond under consideration, does not, therefore, exceed the legal import of the condition required by the statutes. It is usual and proper, indeed, on appearance, to continue the bond with the assent of the surety, and we have no reason to doubt that this course, being a mere matter of practice, was pursued in the present case, as the surety did not make the objection when notified to offer any reasons he might have to set aside the judgment of forfeiture against him. As to the notification mentioned in this bond and assignment of errors, we have already disposed of it.

It is next alleged, "that the act of the Legislature under which the judgment of the lower court was rendered, is unconstitutional, null and void, and has been repealed by subsequent legislation." No argument or explanation has been offered in support of this ground.

It is lastly urged, "that the obligation of the surety was a civil one only, and must be enforced according to the rules prescribed for civil actions. The bond for the appearance of persons accused of crimes, is a means provided to ensure the prosecution and punishment of criminals; the forfeiture of the bond, by judgment, has always been regarded as a criminal proceeding, and whether criminal or civil, was obtained, in this case, in the mode pointed out by the act of the 11th of March, 1837, passed expressly for the purpose.

The judgment of the district court is affirmed, with costs.

QUARRIER et al. v. RICHARDS et al. Captain and Owners of the  
Fanny Smith.

In estimating the damages resulting from a collision, a claim for "loss of the use of a vessel, and of the profits which she could and would reasonably have made during her detention," will not be allowed, at least in a case where the collision was not wanton and malicious. The damage is too remote and uncertain.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Garnet Duncan*, for plaintiffs. *Wolfe and Singleton*, for defendants. By the court :

SLIDELL, J. The owners of the steamer James Hewitt sued the owners of the steamer Fanny Smith, to recover damages incurred by a collision, which they charge was occasioned by the fault of the defendants.

The case was tried before two juries, each returned a verdict for the plaintiffs. On both occasions, the plaintiffs were dissatisfied with the amount of damages awarded to them. They joined in the application made by the defendants for a new trial after the first verdict, and obtained, on their own application, a new trial after the second verdict. The parties then agreed to try the cause before the district judge, without a jury. He, also, came to a conclusion in favor of plaintiffs, and gave a larger amount of damages than either jury had awarded. The defendants appealed, and the plaintiffs, in their answer to the appeal, ask an increase of damages.

The doctrine has been declared over and over again, in this court, that a party will not be permitted to recover damages for a collision, when his own fault has substantially contributed to cause the disaster. There is no reason to believe, from the record, that any misapprehension existed in the minds of the jurymen on this point ; and it is clear, from his written opinion, that there was no such misapprehension in the mind of the district judge. We must therefore conclude, that the two juries, and the district judge, were satisfied that the collision was occasioned by the fault of the defendants, and that they acquitted the plaintiffs of any negligence or mismanagement on their part.

These two verdicts, followed by the opinion of the district judge, are entitled to very great consideration ; and, nothing would authorize us to disturb them short of a very clear and positive conviction, that they had misunderstood the evidence, or erred in estimating its weight—in a word, that manifest injustice had been done. An attentive perusal of the testimony, has by no means brought our minds to such a conviction. Indeed, we are not prepared to say, that we would not have drawn the same conclusion which was adopted by the jurors and the district judge, if the cause had been put originally before us, without the assistance of their opinions. It is true, there is some conflict of evidence ; but the testimony, we think, preponderates in favor of the proposition, that the Hewitt was in her proper position and pursuing her proper course. On the other hand, although the collision was not wanton on the part of the defendants' steamer, it was produced by causes which ought to have been foreseen, and could have been avoided, with reasonable diligence. It seems the Fanny Smith and the Hewitt were ascending the Mississippi, and were passing through a

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chute. Upon entering it, the Hewitt was, under the circumstances, to be considered as in advance, and was so considered by the pilot of the Fanny Smith, as appears from evidence offered by the defendants themselves. The course of prudence and usage, as we infer from the evidence, was to let the Hewitt continue in advance through the chute, or at least use very great caution in the attempt to pass her. Accordingly, it appears that the captain of the Fanny Smith at first determined to keep behind, until the Hewitt got through the chute, and gave corresponding orders. But this discreet intention, without any sufficient reason that we have been able to discover, was subsequently abandoned, or not duly heeded. The boat was kept on at a rate of about nine miles per hour. Coming upon shoal water, the indication of which was apparent, and should have commanded prompt attention, the steamer, after a little while, took a sudden sheer. Upon the testimony, we are satisfied this consequence ought to have been foreseen, and could have been guarded against by running the boat at a less speed. The result of the sheer was, that the Fanny Smith ran across towards the Hewitt, and in a brief space of time, being for the moment comparatively uncontrollable by her helm, and there not perhaps being sufficient time to back her engines, her bow struck the Hewitt violently on the larboard guard, a little abaft the shaft, breaking her plummer-block, gallows-frame, &c.

It may be conceded, that it is for the convenience of the public and the interests of commerce, that steam vessels should proceed with rapidity; but we think that the law will not justify them in proceeding with rapidity under all circumstances, and at all hazards. Such was the opinion of the Supreme Court of the United States in *Nowlan v. Stebbins*, 10 Howard 607; and we must say that, however praiseworthy be that spirit of enterprise, described by counsel, which hurries our countrymen on in the rapid execution of whatever they undertake, we ought not to forget that the safety of human life and property, are also matters of public concern.

It is said by the plaintiffs, that the court below, besides awarding the expense of repairs, should have made an allowance for the general damage, resulting from the violence of the shock, in the opening of seams, starting timbers and joints, throwing machinery out of line, and impairing the general strength and efficiency of the boat. The evidence upon these points is not sufficiently accurate and specific to enable us to make an assessment, which the district judge did not make, and probably thought he had not the means of making, with reasonable certainty.

Among other items, there is a claim in the petition for \$1500 damages for this: "that during the detention for repairs, caused by said collision, the petitioners were deprived of the valuable use of their vessel, and of the profits which she could and would reasonably have made during the detention." The claim appears to us untenable, at least in a case like the present, where the collision was not wanton and malicious. See *Blanchard v. Ely*, 21 Wendell, 243. The objections to it are remoteness and uncertainty.

Judgment affirmed, with costs.

# RUGELY, BLAIR & CO. v. SUN MUTUAL INSURANCE COMPANY OF NEW YORK.

If a ship, soon after sailing, becomes so leaky as to be unable to proceed on her voyage, and this cannot be ascribed to stress of weather or accident on the voyage, the fair and natural presumption is, that the disability arose from causes existing before setting out on her voyage, and consequently that she was not seaworthy when she sailed. In such cases, therefore, it is incumbent on the assured to show that, at the time of her departure, she was in fact seaworthy, and that her inability arose subsequent to the commencement of the voyage.

In case of shipwreck, where the cargo is in condition to reship, and where the means of transportation can be procured within a reasonable time, the master has no legal right to sell; it is his duty to forward the cargo to its port of destination.

Where there is a legal justification for the master to sell the cargo, yet it is his duty to give such notice, as will warn the public of the time and manner of the sale.

If in case of shipwreck, the reshipment of the cargo is proper and practicable, and if, instead of forwarding, the master sell it, the insured cannot abandon and claim for a total, but may recover for a partial loss.

**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Rose-lius, and Benjamin and Micou*, for plaintiffs.

*J. A. Maybin*, for defendants. Where the vessel is lost or disabled, and the cargo is saved, and the master has the means and power of transshipping and sending on the cargo, a loss, caused by his neglect to do so, cannot be recovered of the insurer. 9 Johnson, 21. Ib. 17. 4 Wendell, 45, S. C. 7 Cowan, 504. 1 John. 335. 5 Binney, 595. 7 Howard, 595.

The sale was unnecessary and illegal. The doctrine is well settled, that a sale of goods cannot be made unless in a case of absolute and supreme necessity, such as sweeps "all ordinary rules before it." 1 Arnould, 191. "The power of sale," says Mr. Arnould, Am. ed. p. 198, "however, where the ship is not disabled, or where there exists means of transshipment, must be strictly confined to cases in which the cargo is of a perishable nature, and has suffered so much sea-damage as renders it physically impossible, that if sent on, it can arrive in specie at its port of destination."

"The master is not at liberty, in case of shipwreck, to sell the cargo, merely on the ground that a sale will be the best for all concerned, and that a prudent owner, if present, would sell under the same circumstances, but he will be justified in selling, only by a legal necessity." Ib. 197 (note).

The abandonment must be made within a reasonable time, and what constitutes a reasonable time, depends on the circumstances of each case. Thus, in England, nine days. 15 East. 13; and even five days have been adjudged an unreasonable time. 5 M. and S. 47. *Hunt v. Royal Exchange Association Company*. The insurers and insured in this case, resided in the same city, within five minutes walk of each other.

It is true that Mr. Matthews on July 31, 1851, wrote to the plaintiffs that he had examined the papers, and, considering the proceedings illegal, he could not pay their demand. Supposing that their right to abandon commenced from that date, they still permitted a week to elapse before they abandoned, which was too late, according to the authorities above cited. Hughes, Am. ed. 321, *et seq.* 2 Arnould, Bost. ed. 1175, *et seq.* 5 Mart. N. S. 564. *Mellon v. Louisiana Insurance Company*.

If, however, the court should decide that the plaintiffs have a claim against the defendants, we contend that it can be only for a partial loss. The policy is a valued one, and the mode of adjusting a partial loss, on a valued policy, is fully laid down in 1 Arnould, 309, 310, 311; and the practice in this country, it is believed, universally corresponds with it.

By the court:

SLIDELL, J. The plaintiffs sue for \$7500, the value of one hundred and twenty-five bales of cotton, insured by the defendants under a valued policy on

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a voyage from Matagorda, in Texas, to New Orleans. The schooner *Velasco*, in which they were shipped, left Matagorda Bay on the 24th June, 1851, returned to the Bay, on the 26th, in a sinking condition, and, for the purpose of saving the cargo, was beached. The persons who assisted in bringing her in made a claim for salvage, which was submitted, by the captain, to arbitration. A survey was called, and a sale of the cotton recommended. It took place on the 3d July. The net proceeds, after deducting, among other items, thirty-three and one-third per cent salvage, allowed by the arbitrators, amounted to \$1177 55. The purchaser of one hundred and twenty-two bales reshipped them to the plaintiffs, in another vessel, which arrived in New Orleans on the 21st July, 1851. The gross proceeds, at New Orleans, were \$3595 71, and net proceeds \$3151 32. In the latter part of July, the plaintiffs applied to the defendants for payment of a total loss. The agent of the defendants replied, in writing, that he had examined the papers submitted to him; that the sale of the cotton and other proceedings were irregular and illegal, and that the claim was consequently not recognized. On the 6th August, 1851, the plaintiffs, by letter, made an abandonment.

In their answer, the defendants resist the claim on the ground of the unseaworthiness of the vessel, and also on the ground that the sale was illegal, and in violation of the terms of the policy.

Upon the latter ground the district judge gave judgment in favor of the defendants, and the plaintiffs appealed.

Our attention will be first directed to the question of seaworthiness. The evidence upon that matter lies within a narrow compass, and consists of the protest, the testimony of the captain, taken under commission, and the testimony of Captain Swain, an inspector for New Orleans underwriters.

The material part of the protest, which is signed by the captain, mate, and two seamen, is as follows: "That the said schooner being tight, staunch and strong, and having a full cargo of merchandise on board, in the port of Matagorda, bound for New Orleans, they, on Monday the 23d day of June, 1851, having every thing ready and fully prepared for sea at 5 o'clock, A. M. of said day, hove up the anchor, proceeded on their intended voyage, and stood down the bay with pleasant weather, and wind from the N. N. W.; that at 10 o'clock, A. M. of said day, it became calm, and they came to anchor; at 1 o'clock, P. M. of said day, the wind having sprung up, they hove up the anchor, and proceeded down the bay; at 5 o'clock, P. M. they took aboard a pilot to carry them over the swash, and at 7 o'clock, P. M. came to anchor off Ducrow's Point. Tuesday, the 24th June, at 5 o'clock, A. M. heve up the anchor and made all sail, with a fresh breeze from the N. W. and proceeded down the bay to the bar; tried the pumps and found no water; at 6 o'clock, A. M. took a bar-pilot on board, and at 8 o'clock, A. M. after crossing the bar, discharged the pilot, and proceeded on their intended voyage with the wind from the E. N. E., making their course towards the S. E. with pleasant weather; at 12 o'clock, M. hove ship, and stood in shore for land; at 6 o'clock, P. M. being close in land, hove about, and stretched off with the wind from the N. E. Sounded the pump and found no water, and continued on their course until midnight, when they tacked ship, the wind having canted more to the eastward, and increasing; tried the pumps and found no water.

"Wednesday, June 25, 1851. At 1 o'clock, P. M. found the vessel would not steer as she ought to do; tried the pumps and found they would not suck; went forward and found the water over the fore-castle deck; called all hands

immediately on deck to the pumps, which were kept constantly going, and endeavored to make land, the wind increasing towards the eastward, and the water increasing so fast, that they found that they were in a sinking condition."

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At daylight, went aloft to look out for land. Saw a steamship running down. Made a signal of distress, but no notice taken; the vessel at this time being water-logged, and impossible to steer; the wind still increasing, blowing very heavy, and the atmosphere very thick. At 9 o'clock, A. M., made the breakers on the bar, with the signal of distress flying; no pilot appeared; followed the breakers down, looking out for the pass; the sea breaking very high. At length found a place where they thought they would go over, not being certain whether it was the pass, or not; saw a pilotboat inside, but no appearance of any effort made to come to them, the sea all the time breaking fearfully over the bar, and concluded that they could not come to their assistance. Finding no alternative, as the vessel was making water fast, with two men at the helm, and the remainder of the crew assisting steering with her sails, managed to get her through the breakers, in the eastward or old channel, without touching, the vessel leaking fast, with all hands at the pumps. After crossing the bar, the vessel unmanageable, with the Union Jack down, and all their available power at the pumps to keep her from sinking, the pilotboat came off, (the wind having increased to a gale); threw a line on board the pilotboat, for the purpose of towing them on shore; but, the gale still increasing, the rope parted, and the vessel making water faster, though the pumps were constantly kept going. Kept their signal of distress flying, and at half past nine o'clock, Cap. Thomas Ducrow came off from St. Joseph's Island in a small boat, and tendered the services of himself and crew, to bring us into port. Finding themselves in a sinking condition, the water making fast, and the wind still increasing, they accepted his services to bring them into a safe place, where the vessel and cargo could be preserved; and, about 11 o'clock, A. M., with much difficulty, got alongside of Ducrow's wharf, &c., &c.

The captain, who was examined under commission by the plaintiffs, was asked by them, whether he desired to make any explanations or corrections of what was stated in his protest. He answered, that he had nothing to add; that it was correct. With regard to the condition of the ship, he stated that it was good before her departure; that she performed well on previous voyages, as well as any vessel he had been in; and that she was tight, staunch and strong. On his cross-examination he stated, that the vessel was about eight months old, built of white oak, and not coppered; that he saw her bottom last at New York; that she was tight when he boarded her at Matagorda; that she did not leak more on former voyages than vessels usually do; that he did not, when the leak was discovered, find out the cause of it, "but judged it was from distress of weather. After she was discharged, and pumped and bailed out, he found one leak between the mast, and in the centre case."

Swain testified, that he was inspector for several of the insurance offices, and well acquainted with the character and class of vessels. That, from the facts detailed in the protest, he considered the vessel unseaworthy at the time she sailed. He assigned as his reasons for that opinion, that the protest showed no bad weather from the time of her getting under weigh, until they found her leaking so fast that they could not keep her free. He also stated, that a vessel not coppered, is liable to be worm-eaten.

Such is the substance of all the evidence before us upon the question of seaworthiness; and the strong impression it has produced upon our minds is, that she was not seaworthy when she sailed.

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When a ship becomes so leaky as to be unable to proceed on her voyage, soon after sailing on it, and this cannot be ascribed to stress of weather or accident on the voyage, the fair and natural presumption is, that it arose from causes existing before her setting out on her voyage; and, consequently, that she was not seaworthy when she sailed. In such cases, therefore, it is incumbent on the assured to show that, at the time of her departure, she was in fact seaworthy, and that her inability has arisen from causes subsequent to the commencement of the voyage. Such is, substantially, the rule, as stated by an able commentator, and it appears abundantly sustained by the authorities. See Arnould, vol. 1, p. 686. Phillips 1, p. 324. *Smithen v. Memphis Insurance Company*, 3 Ann. 175. *Talbot v. The Commercial Insurance Company*, 2 Johns. 128. *Watson v. Clarke*, 1 Dow. 344.

In *Talbot v. The Commercial Insurance Company*, a vessel sailed with a fair wind and moderate weather, and in the evening of the following day suddenly sprung a leak, in consequence of which she foundered, without any apparent cause or extraordinary accident to which the leak could be ascribed. It was held: that the loss was to be presumed to have arisen from her not being seaworthy at the time she sailed. A verdict of the jury in favor of the assured was set aside, and a new trial granted.

In *Munro v. Vandam*, cited by Park, 289, it was held, that if a ship sail upon a voyage, and in a day or two becomes leaky, and founders, or is obliged to return to port, without any storms, or visible or adequate cause to produce such an effect, the presumption is, that she was not seaworthy when she sailed; and the jury, upon plaintiff's own case, may draw such a conclusion.

The question then is, whether the fair and reasonable presumption of unseaworthiness, arising from the facts of the voyage, as exhibited by the protest, is counteracted and overthrown by the testimony of the master. And we are constrained to say, that his testimony has not brought home such a reasonable conviction to our minds, as would induce us to believe that some unknown accident or peril of the sea, and not the defectiveness of the vessel, was the cause of the leak. We cannot concur with the learned counsel for the plaintiffs, in the opinion, that this case is as strong as that of *Smithen v. The Memphis Insurance Company*. In that case, it is true, the cause of the accident was unexplained. But numerous witnesses testified in favor of the seaworthiness of the barge. The evidence came not merely from the officers and crew of the steamer that had the barge in tow, but from other reliable sources, such as two inspectors, at her port of departure, &c. So that the court there characterized the evidence of seaworthiness, as extremely full and cogent. And it should also be observed, that the barge was navigating the Mississippi, where there is peculiar danger from snags, shoals, logs and sand bars; that she was in tow of a steamer, and that, under all the circumstances, the chances of an external peril being encountered, without its occurrence being discovered at the moment, were much greater than in the case of a ship at sea.

We do not pretend to lay down any rule, as to the extent and nature of the testimony that must be adduced in a case of this sort, to overthrow the reasonable presumption which the law raises; but the evidence should certainly be stronger than has been offered in this case. It is proper to add that, in *Cost v. The Delaware Insurance Co.*, 2 Washington, 376, Mr. Justice Washington observed, that if a vessel, after she commences her voyage, becomes unfit to prosecute it, and has been exposed to no extraordinary perils of the sea, the circumstance may raise so strong a presumption of her having been unseaworthy at the time of her



departure, as to call upon the insured to give strong evidence to repel the presumption.

We feel a reluctance, however, to close the case upon this point against the plaintiffs, for two reasons: The district judge did not act upon it, so that we have not the benefit of his opinion as to the weight of evidence; and the plaintiffs may have been thrown off their guard, in the preparation of this branch of the litigation, by the fact, that the underwriter originally made no objection on that score, to the payment of the loss. We have thought it best, under all the circumstances, to leave the matter open for future inquiry.

The district judge, as we have already stated, decided the case against the plaintiffs on another ground, which we proceed to consider. The policy states: that "in case of the loss of the vessel, or a part of the cargo, or of damage to the whole or part thereof, it shall be the duty of the master to forward such parts of the cargo, as shall be saved in a fit condition to be shipped to its port of destination, by the best conveyance obtainable, at the place where the said goods may be, or at any other place within a reasonable distance, and the enhanced expense, not exceeding the amount insured, shall fall on the insurers."

From the evidence, it appears that the cotton was in a fit condition to be shipped to New Orleans. The means of transportation to New Orleans, could have been had within a reasonable time. There were means of consulting underwriters, and others interested, before selling, and no inexorable necessity that compelled an immediate sale. There was an inexcusable precipitancy, and, as we infer, an inexcusable want of publicity in the time and manner of the sale. There was an inexcusable haste and looseness in the proceedings for arbitration as to the salvage. The recommendation of the surveyors, that the cargo should be sold; the sale of the cargo; the agreement with the salvors to arbitrate the award, all bear date on the same day, the 3d July, 1851.

In view of these facts, of the well settled principles of law, and especially of the stipulation in the policy, we have no hesitation in concluding with the district judge, that the sale was illegal, the abandonment inefficacious, and the claim for a total loss unfounded.

But we are not prepared to say with the court below, that the plaintiffs are thereby precluded from any relief. If the vessel was unseaworthy, there is of course an absence of all claims for the loss against the defendants. But if she was seaworthy, we see no reason, as at present advised, for the entire discharge of the underwriters, by reason of the failure to forward the cargo. The plaintiffs, it seems to us, would still be entitled to indemnity as for a partial loss.

It is therefore decreed, that the judgment of the district court be affirmed, but without prejudice to the right of the plaintiffs, to sue for a partial loss; the costs of the appeal to be paid by the plaintiffs.

PRESTON, J. In this case, I desire to express no opinion as to the law or evidence with regard to the seaworthiness of the vessel at the commencement of her voyage, but fully concur in the remainder of this opinion.

### THE STATE v. BENITO ALVEREZ.

The clerk of a court, to which a criminal cause is removed for trial, should endorse on the indictment and other papers received by him from the court, where the indictment was found, that he filed them. Yet where he failed to do so, and the prisoner was put upon trial,

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but before verdict, a motion was made to endorse the papers *nunc pro tunc*, it was held : That the court had the custody of the papers, and it was its duty to grant the motion. Objection to the pannel or polls cannot be taken advantage of, if not made by challenge, when the jury or jurors are presented to the prisoner on trial. He cannot take the chance of a verdict in his favor, by a jury of his choice, and afterwards object to that jury. The newly discovered evidence, which entitles a party to a new trial, is such as ought to produce, on another trial, a different result on the merits.

**A**PPEAL from the District Court of the Seventh Judicial District, *Stirling, J. Lyons*, for the State. *James H. Muse*, for the accused. By the court :

PRESTON, J. The prisoner having been prosecuted, tried and convicted of murder, and sentenced to imprisonment at hard labor in the penitentiary for life, has appealed. He was indicted, arraigned and plead in the parish of East Feliciana, the homicide having been perpetrated in that parish.

Under the 115th article of the Constitution, authorizing a change of *venue*, and the Act of the 1st of June, 1846, to carry it into effect, the accused made the necessary allegations and proof, and obtained an order that the case should be transferred to and tried in the parish of West Feliciana. The clerk of the district court of the parish of East Feliciana transmitted the papers and copies of the proceedings, to the clerk of the court of the parish of West Feliciana, as required by the statute, and the sheriff of the one, delivered the prisoner to the sheriff of the other parish.

The 13th section of the Act of 1846 provides, " that the clerk of the court to which any criminal cause shall be removed, shall, on receipt of the indictment and other papers, enter the cause on the criminal docket of his court, and the said cause shall be heard, tried and determined by the court, by preference, in the same manner as if the proceedings had originally been instituted therein," p. 109.

The case must have been entered on the criminal docket of the court, for an order was made in the case by its title, "*The State of Louisiana v. Beneto Alvarez*," directing a jury to be summoned for the trial, and the list of that jury was served upon the prisoner on the 10th of December, 1851, by the sheriff of West Feliciana. And on the 18th day of the month it appears, by an entry in the case, that the prisoner was brought by the sheriff to the bar of the court, on the charge, and declared himself ready for trial, and was put upon his trial before a jury. But, before they rendered their verdict, it was discovered that, from some oversight, the clerk of the district court of West Feliciana had not endorsed on the papers sent from the parish of East Feliciana, that they were filed, though they were clearly in his possession and keeping as clerk, and were used on the trial.

The law did not expressly declare that they should be filed, though it was undoubtedly proper that it should have been done. Therefore the court, as soon as the omission was discovered, on motion of the district attorney, and in the presence of the prisoner and jury, on the 19th of December, 1851, ordered them to be filed as of the 9th of December, *nunc pro tunc*. The court had the control of the records, and it was its duty to order this to be done for their safety and authenticity. The failure to file the record and documents was a mere omission, and the judge, without causing injury to any one, directed that which was proper to have been done some days before, to be done, when the omission was noticed. This so frequently occurs in practice, from unintentional oversight, that the phrase *nunc pro tunc* is familiarly known as a law term, which is used on such occasions to express, that a thing is done at one time which ought to have

been performed at another. The only qualification in relation to it, in judicial proceedings, are, that it ought to be done; that it be done by the leave or order of the court, perhaps in the presence of the parties interested, and that it be done to answer the purposes of justice, and not to do injustice.

No injustice was done in the present case. It was not, as contended, the filing of the documents, that gave the court in West Feliciana the jurisdiction of the case, and the jury power to try the prisoner. His successful motion to change the *venue* for the trial of an indictment found against him for murder, from East to West Feliciana; the delivery of his person by the sheriff of one parish, to the sheriff of the other, for trial; and the transmission of all the proceedings against him from one clerk to the other, were the things which gave jurisdiction to the court that tried him, and power to the jury to pass upon his case and acquit or convict. The filing of the papers was a mere form which, without any possible injury to the prisoner, was complied with as soon as it was discovered that it had not been seasonably done.

Similar omissions have, no doubt, often occurred in judicial proceedings in criminal cases and been corrected in the same manner, and yet we have no precedent, that the correction has been regarded as objectionable by any tribunal. The objection must be supported by authority or fail, for it is intrinsically without any substantial foundation.

The motion in arrest of judgment, based upon this important matter, cannot therefore, prevail.

Nor can the judgment be arrested on account of the charge of the court in relation to it. It was immaterial to the power to try the prisoner; immaterial to his guilt or innocence, as to which; a proper issue between him and the State was presented, in a proper manner, and before a competent tribunal. And, therefore, the charge of the court, that the jury had nothing to do with the oversight in not filing the papers, and the correction of the omission, was correct; and even if the judge illustrated his opinion by an erroneous view, as to defects in an indictment, it cannot make that material in the case, which was intrinsically immaterial.

Three of the jurymen, who were on the list served upon the prisoner to pass upon his trial, were excused, one on account of age, and two as being school directors. A pannel of forty-eight was provided by law, and summoned in the case, for the express purpose of insuring a speedy trial, and that the case might not be continued in consequence of a deficiency of jurymen from any cause. The prisoner made no objection to the pannel, and did not ask for a continuance of the case. In this respect, the case is entirely different from that of *The State v. Howell*, in which a continuance of the case was prayed for, on account of such a disparity between the list served upon him, and the number summoned for the trial, as might have operated great injustice, and, in effect, have destroyed the beneficent provision of law, that he should be served two days before the trial, with the list of the jury summoned to try him. *State v. Howell*, 3 Ann. 51.

We have often held, that objection to the pannel or polls, cannot be taken advantage of, if not made by challenge when the jury or jurors are presented to the prisoner for trial. He cannot take the chance of a verdict in his favor, by a jury of his choice, and afterwards object to the jury when the verdict is rendered against him.

The testimony of *White*, discovered since the trial, was cumulative alone. It may be reconciled with the testimony on behalf of the State. And we concur with the district judge, who has stated it in connection with the evidence of the

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State, that it ought not to have changed the verdict. It is laid down as an elementary rule by Wharton, 664, that in order to grant a new trial on account of newly discovered evidence, it must be such as ought to produce, on another trial, an opposite result on the merits: and several authorities are cited in support of this principle. We substantially recognized it in the case of *The State v. Brette*, 6 Ann. At all events, we would not interfere with the discretion of the district court in refusing a new trial, because testimony, merely cumulative, might be produced. The authorities are numerous in support of the ruling of the district court. Whart. Crim. Law. 661. 1 Story, 218. 1 Sumner, 482.

The counsel contends, that facts stated by the judge assimilates the case to the facts proved on *Selfridge's* trial, and that we have approved the principles of law laid down in that case, and therefore infers that the result should be the same. We have approved those principles, but doubted their application to that case, and think they have no application to the case under consideration.

The judgment of the district court is affirmed, with costs.

Application for a re-hearing refused

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### THE CITIZENS' BANK OF LOUISIANA v. THE LEVEE STEAM COTTON PRESS COMPANY.

It was competent for the State to make such changes in the mode of administration of the insolvent banks, as the public interest required.

The laws which have from time to time been passed for the liquidation of the affairs of the Citizens' Bank of Louisiana, are constitutional.

The decree of forfeiture, pronounced against that bank, did not thereby give the right to the stockholders to insist on an immediate liquidation of its affairs.

The statutes, which provide for a more protracted administration, did not impair the obligation of any contract; nor was the stockholder, in consequence of those statutes, invested with a right to release his property from mortgages which he had created on it.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. A. Pitot*, for the plaintiffs. *John R. Grymes* and *A. K. Josepchs*, for defendants. By the court:\*

**EUSTIS, C. J.** This appeal is taken by the defendants, from a judgment rendered against them at the suit of the Citizens' Bank, in the Court of the Fourth District of New Orleans, for the sum of four thousand five hundred and six dollars, with eight per cent interest, from the 1st of May, 1851.

The action was for the recovery of an assessment of one dollar per share on the stock of the bank, which was imposed for the term of seven years, for the purpose of meeting the obligations of the bank within that time. It is not understood that any question is raised concerning this assessment, except that which involves the constitutionality of the legislation, by virtue of which the liquidation of the affairs of the bank has been conducted.

This point has been argued at bar, and we shall proceed at once to give our impressions upon it, without referring more than is necessary to the details connected with it.

The ground on which the constitutionality of this legislation is assailed, is that it impairs the obligation of contracts. The precise point in which the legis-

\**Preston, J.*, did not sit in this case.

lation conflicts with the Constitution, is not stated; but the proposition is put on general terms, and it is supposed that the objection will be best met, by considering the constitutionality of this legislation as a whole.

By the forfeiture of the charter of a corporation under the Civil Code, the corporation itself became extinct. Code, article 38 § 2. *The State v. The Orleans Navigation Company*, 7 Annual, (decided in February term 1852.)

But though the corporation was dissolved by a decree of forfeiture, the property of the corporation became vested in its members, and this court held, that courts had the power to appoint persons to liquidate and settle the affairs of an insolvent bank, whose charter had been decreed forfeited, in the absence of any provision by law for that purpose. *Stark v. Burk*, 5 Ann. 741.

The Citizens' Bank is one of the property banks of New Orleans. Its charter was created by two laws, one passed in 1833, and the other in 1836. Under the latter, the bank went into operation, the State issuing its bonds for several millions of dollars. These bonds having been negotiated for the benefit of the bank, its capital was thus provided. The stockholders gave mortgages for the amount of their stock, which were given in order to secure the payment of the capital of the bank thus furnished, and the loans to which they were respectively entitled, as stockholders, under the charter.

The duration of the charter of the bank, was limited to fifty-one years from April 1833.

The Act of 1842, providing for the liquidation of banks, in its first section, reenacted the general provision of the code concerning the effect of the forfeiture of the charters of bank. In the 28th section, it had this clause for the benefit of these banks, in which the State itself was a stockholder, or for which it had issued its bonds: If a decree of forfeiture be rendered against any one of such banks, the corporation shall not be deemed dissolved, but it shall retain all its corporate powers and privileges, with the exception hereinafter mentioned, &c.

The charter of this bank was adjudged to be forfeited under this Act of 1842, and by virtue of this act and of the Act of the 5th of April, 1843, the State had entered into the possession, and the exclusive management of its assets, and took upon itself the administration of its affairs. The corporate existence of the banks, appears to be maintained throughout all the legislation in relation to it.

By the third section of the Act of 1836, authorizing the emission of bonds on the part of the State, in order to provide the capital for the bank, it is provided, that for the guarantee of the bonds thus emitted, all the securities granted, under the act of incorporation, to the holders of its bonds, are hereby transferred to the State and the holders of the bonds to be issued under the Act of 1836. The securities, particularly thus referred to, were the mortgages given for stock, which were to stand as securities for the loan, which was to be made to provide the monied capital of the bank. This section, it will be observed, transfers these securities to the State and the holders of the bonds. As the bonds were to be issued by the State, this clause can have no meaning, except to transfer the securities to the State, as a species of pledge, for the bonds which were to be issued by virtue of the act.

There never was an occasion in the history of this State, in which the active interference of the government was more imperatively called for, than in 1842. A violent convulsion in the monied affairs of the country had taken place. So urgent was the necessity, that a general bankrupt law had been passed to take

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effect in that year. The banks in this city, which furnished the ordinary currency, were most of them insolvent, many hopelessly so. There was no provision in the bankrupt act, nor in the statutes of the State, for the liquidation of insolvent corporations. The charters of the two property banks had been violated, and their notes and obligations were in sufferance. In this state of things, the laws were passed, vesting the possession of the assets of these banks in the State, and providing for their administration under its authority, whenever their charters should be judicially decreed to be forfeited, and these banks should not comply with certain conditions imposed by the Act of 1842. Managers were to be appointed by the State, who were to conduct their affairs under the direction of the board of currency. Under the administration of the managers appointed by the State, this institution was conducted until the year 1847, when the administration was changed. Three managers appointed by the State, and three directors chosen by the stockholders, constituted the board entrusted with the affairs of the bank under the law of that year.

We do not perceive in this legislation anything more than the exercise of the power, which the government of the State has over bankrupt estates. This power is inherent in all well regulated governments, under which commerce is regulated. In England, statutory provisions in the nature of bankrupt laws, have been from time to time enacted for more than three centuries, from the reign of Henry VIII to William IV. It was exercised by several of the States before the Constitution of the United States, and the power to pass uniform laws on the subject of bankruptcy, was unanimously conceded to the government of the United States, by the convention which framed the Constitution. In almost all the States, insolvent or bankrupt laws are in operation in some form more or less stringent.

Blackstone says, that by virtue of the statutes of bankruptcy, a bankrupt may lose all his estates, which may be at once transferred by his commissioners to their assignees without his participation or consent. 2d Commentaries, 286 and 480.

The power has been frequently exercised in this State, by the enactment of laws for the sequestration of the property of debtors.

If it was competent for the State to provide, by law, for the administration of the property of insolvent banks, the power to make such changes in the mode of administration as the public interest required, we do not think can be drawn in question, under the facts of the present case. The possession asserted by the State of the assets of the bank, was constructive, and for the purpose of putting them beyond the reach of wasteful and destructive litigation. It was administrative and conservative in its object and character. The affairs of the bank were put in commission under the authority of the State, as any other insolvent estate would be, under ordinary commissioners or syndics.

The present action, as we have stated, was for the recovery of an amount assessed on each share by the managers and directors of the bank, under the new administration, organized under the Act of 1847. The first series of the State bonds, due in 1850, could not be met by the bank; and an agreement was made with the holders, by which the payment was extended to five annual installments, and more than half a million of arrears of interest was funded in seven annual payments. By the Act of 1847, it was made the duty of the managers to exact from the stockholders, such an annual contribution, as would form a fund sufficient to meet regularly the payments due on the bonds of the State. By a resolution of the board, a call was made on the stockholders, for

this object, of seven dollars per share, payable from one to seven years, in the sum of one dollar per share.

It is contended, on behalf of the defendants, that they have a right to insist on an immediate liquidation of the affairs of the bank, and cannot be compelled to submit to this protracted administration imposed by the Legislature, and have a right to have their property released from the burden of their mortgages.

A view of the situation of the bank shows, that an immediate liquidation of its affairs is impossible.

In 1836, the State issued its bonds, to the bank, for upwards of seven millions of dollars, one fifth of which were payable in the years 1850, 1859, 1868, 1877 and 1886. Coupons of interest were attached to each bond, made payable in London and in Amsterdam. The first series of bonds amounting to \$1,279,557 14, fell due in 1850, which the bank could not pay, and for which no provision was made by the State. Besides this amount in sufferance, the arrears of interest due on the bonds, amounted, in 1849, to no less than the sum of \$883,736 43, a portion of which was funded, as has been before stated. When it is considered that so large a portion of the capital of the bank is, by its charter, loaned out on mortgage to the agricultural interest, it is obvious that the available means of the bank at any future period, must be attended with uncertainty, and that an immediate realization of its assets is impossible.

The extension of the term of payment of the series of the bonds for five years, in annual installments, was authorized by the Act of 1847, and it seems obvious that, in the presence of facts like these, an administration of so weighty and complicated a character as this, ought not to be disturbed, except in the furtherance of a clear and well defined right.

Being of opinion that there is nothing unconstitutional in this legislation, we see no legal grounds for the refusal, on the part of the defendants, to pay the contribution imposed, in order to meet the engagements of the bank, to which they bound themselves, by their original obligations, for stock.

As the only question argued at bar was that on which this opinion is given, we have refrained from touching any other subject relating to the defence. The case presents a variety of phases, under which we have considered it in our deliberations, but none of them can sustain the present defence.

The judgment of the district court is therefore affirmed, with costs.

## STATE OF LOUISIANA v. THE JUDGE OF THE FIFTH DISTRICT COURT OF NEW ORLEANS.

Where the interest of the applicant appeared to be less than three hundred dollars, the Supreme Court refused to entertain an application for a *mandamus*.

ON an application for a *mandamus*, Mott and Frayser appeared for the applicants. By the court:

SLIDELL, J. The application does not assert that the applicants have any interest in the property sequestered, beyond the freight, to wit, \$156 28; while, on the other hand, some of its allegations are pregnant with the inference that their interest is thus limited. To authorize us to interfere, by *mandamus*, a clear showing as to our jurisdiction should be made. The present application being unsatisfactory in its averments, is dismissed at the costs of the applicants.

**LEVERICH, Curator of the Succession of WALSH, v. CITIZENS' BANK OF LOUISIANA.**

A party who asks relief by injunction, against the entire claim of his creditor, should make such a showing as will distinctly inform the court of the pecuniary extent of his danger.

**A** PPEAL from the Fourth District Court of New Orleans. *Samuel R. Walker*, for plaintiff. *A. Pilot*, for defendant. By the court:

**SLIDELL, J.\*** The bank obtained an order of seizure and sale against certain shares of bank stock, lands and slaves, belonging to the succession of *Walsh*, pledged and mortgaged to secure a stock note for \$8907 40, made by *Walsh*, which has been reduced by partial payments. Our impression at the argument was, that there was hardship in the prosecution of the seizure, under the circumstances stated at bar, and that, perhaps, the plaintiff in this suit was entitled to enjoin. Such may really be the case. But, upon examining the petition for injunction, we find its averments to be loose, and particularly in this, that there is nothing in the petition which indicates what is the amount of the tacit incumbrance which is said to be set up, as a prior burden, superior to the mortgage in favor of the bank, which latter mortgage *Walsh* appears to have assumed upon buying the stock, lands, &c. A party who asks relief by an injunction, against the entire claim of his creditor, should make such a showing as will distinctly inform the court of the pecuniary extent of his danger; and this is particularly to be required in this court, where the plaintiff in injunction asks us to disturb a decree of the district court adverse to his pretensions. Our jurisdiction in this case is not quite clear.

Judgment affirmed, with costs.

**HILLS v. MOONEY—MOONEY v. HILLS.**

A suit for the rescision of a sale, on the ground that the vendor promised to release existing mortgages before the payment of the first note, cannot be sustained where the vendor had made no offer to pay the first note, and where there is no evidence of what the mortgages are, of which he complains.

**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. T. Wharton Collens*, for *Mooney*. *E. L. Gould*, for *Hills*. By the court:

**EUSTIS, C. J.** On the 16th of April, 1851, the plaintiff sold to the defendant two lots of ground in the city of New Orleans, for \$2200, of which five hundred and fifty dollars were paid cash, and for the balance the defendant gave him two notes for \$825 each, payable in twelve and eighteen months.

The certificate of mortgages was dispensed with in the act of sale, and the defendant took from the plaintiff's agent an agreement, under private signature, to furnish the defendant a clear certificate from the recorder of mortgages for this

\* *Preston, J.*, did not sit in this case.



MAN  
S.  
MOORE.

parish, stating that there are no mortgages recorded against the lots sold; said certificate to be furnished prior to the payment of the note, say twelve months from the 16th of April, 1850. The plaintiff reserved a mortgage on the lots, and what other mortgages affected them, is not made to appear.

The clear certificate was not furnished the defendant until the 21st of November, 1851, after an order of seizure and sale had been issued on the plaintiff's mortgage, which was enjoined at the instance of the defendant.

In the petition for the injunction, the defendant claims to have the sale rescinded, on the ground that the certificate was not furnished within the time stipulated, &c.

The district judge decreed the rescision of the sale, and the recovery, by the defendant, of the cash and notes. The plaintiff has appealed.

The defendant bought property, and gave his notes for it, when he knew it was mortgaged, under a private agreement on the part of the vendor to raise the mortgage prior to the payment of the first note. The words, "say twelve months from the 16th April, 1851," do not materially affect the sense of those which precede it. He has never paid, or offered to pay, the first note. We have no evidence whatever, as to what the mortgages were of which the defendant complains. Under these facts, we see no ground for the rescision of the sale. *Denis v. Clague's Syndics*, 7 Mart. N. S. 97. *Pierce v. McMahan et al.* 15 L. R. 218.

This case was tried under an agreement as to the pleadings, which it is not necessary to recite. Acting on this agreement, we can only give this judgment:

It is therefore decreed, that the judgment of the district court be reversed, and that the plaintiff's petition be dismissed with costs, the defendant paying the costs of this appeal; and that the right of the plaintiff to recover the unpaid balance of the price of the lots, be reserved.

### PIERRE A. BECKNELL v. A. G. WEINDHAL.

Article 656 of the Civil Code should be so construed, as to reconcile the respect due to property with the interests of agriculture.

The fall of lands fronting on the water courses in Louisiana, is from the river to the swamps behind; the natural drain is, therefore, from the front to the rear, and the right to drain them to the rear by means of ditches, cannot be doubted; but that right should be exercised, so as to cause no injury to others without necessity. The owner of front lands cannot, therefore, by artificial drainage, accumulate the water in the rear of his field in a much larger volume, than if suffered to flow naturally, and thereby impose a more burdensome servitude on the lands of the proprietor below.

**A** PPEAL from the District Court of the parish of St. John the Baptist, *Albert Duffel, J. D. Forcelle*, for plaintiff. *St. Paul and Bouvy*, for defendant. By the court:

ROSE, J. The plaintiff, who is the owner of a sugar plantation fronting on the Mississippi river, has obtained, against the defendant who owns the adjoining plantation below, a judgment ordering him to remove certain works erected by him on his estate, on the ground, that they obstruct one of the natural drains of the plaintiff's land.

The defendant has appealed, and asks a reversal of the judgment on two grounds: First, that the natural drain claimed, no longer exists. Second, that

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WEINDEAL.

if it does exist, the plaintiff has done upon his land, works which render the servitude more burdensome, and the drain constructed by him is no more than adequate to counteract the injurious effects of those works upon his lands. He relies upon the authority of the case of *Martin v. Jett*, 12 L. R. 501.

It may be conceded, that article 656 of the code, upon which both parties rely, should be construed, so as to reconcile the respect due to property with the interests and necessities of agriculture, and the Roman law from which that article is derived, is the best source to which we can resort for the purpose of ascertaining its practical meaning. Although the rule of law was, in Rome as here, that the owner of the upper estate can do no act, by which the servitude on the estate below is rendered more burdensome, by the jurisprudence of that country, he had the right to do all works necessary for the cultivation of his fields, without regard to consequences; he could throw his land in ridges, and give the water-furrows any direction he thought proper; when useful to his crops, he was authorized to accumulate the waters falling upon his lands, in the rear of his field, without being subjected to the action *aquae pluviae arcendae*. D. § 5, l. 1, *de aqua et aqua*.

The same right is clearly deducible from the tenure of the lands fronting on water courses in Louisiana. The fall of those lands, is from the river to the swamps behind. The natural drain of the water falling on those lands, is therefore generally from the front to the rear, and the facility of draining to the low grounds behind was, no doubt, one of the reasons why grants were made with narrow fronts on the rivers, and running back a great depth for quantity. The condition of those grants was, that the land should be cultivated; and the obligation to improve and cultivate, necessarily implies the power in the grantee to do all works necessary to a profitable cultivation; and, as they cannot be cultivated without being drained, the right to drain them to the rear, by means of ditches, cannot be doubted; but that right should be exercised so as to cause no injury to others, without necessity. The plaintiff, in this case, must take the burdens as well as the benefits of artificial drainage; and after availing himself of it, to accumulate the water in the rear of his field in a much larger volume than it it would have if suffered to flow naturally, and rendering thereby the servitude on the back lands of the defendant more burdensome, it would be unjust to permit him to accumulate, without necessity, a portion of those waters in the middle of his field, and to throw them, as from a stream, on the cultivated lands of the defendant. This necessity is shown not to exist; the works complained of were erected several years ago, and the canal, at the defendant's lower line, has been found sufficient for the drainage of his land to a greater depth, than that of the natural drain claimed.

Under the Roman law, when the works erected to obstruct the running of the water had been made openly, and in the presence of the party who had a right to object to them, and he had not objected, his implied acquiescence was held to be a waiver of the right of servitude. See Digest, laws 19 and 20 *de aqua et equa*. The spirit of that legislation, at least, may be invoked in aid of the presumption arising from the long silence of the plaintiff, that he considered himself no longer entitled to drain through the defendant's fields.

There are, no doubt, cases in which the drainage from the front to the rear, is interrupted by bayous and deep *coulées*, which the proprietor of the lower estate is bound to keep open; but every low place, in a cultivated field, is not a natural drain, although the rain water coming from above might flow through it, if the land was in its natural state; the best portion of the alluvial soil of Louisiana

is undulating, and the opposite construction would subject half of it, to perpetual sterility. When the low places in a field are not too deep to be drained by the system of draining now in general use, they become a part of the field, and cease to be natural drains.

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v.  
WEINDHAL.

The evidence in this case shows, that the *coulée*, claimed as a natural drain, begins some distance from the land of the plaintiff, and extends through it and through that of the defendant; that a portion of it, remaining in its natural state at the boundary line of the two plantations, is about two feet deep; that other parts of it have been cultivated for many years by the defendant, and others, and that it would all be susceptible of cultivation, if the plaintiff had not converted that portion of it, between his lines, into broad and deep reservoirs for the rain water. It is also shown, that the plaintiff, not viewing it as the natural drain of the lands above him, has drained it up as it enters his field, and again in the middle of his plantation; the water in the reservoir between the two dams, is carried to the swamp behind by four leading ditches; that which accumulates between the lower dam and the defendant's line, is carried to the rear by a canal deeper than the *coulée* in its natural state, and sufficient to drain that portion of the plantation. If, by a sudden sinking of the land in the direction of this canal, it had become lower than the *coulée*, the new opening thus formed would have been, henceforward, the natural drain of the plaintiff's land, and the *coulée* might have been closed by the defendant and cultivated. The plaintiff has effected the same result by artificial means, and, as in the interest of agriculture the law gives to his canal all the immunities of a natural drain, it must also be viewed in that light, so far as it liberates the defendant from a double servitude.

It is a matter of high public interest, that all low and wet lands in our fields, be made useful to man, and the conclusion to which we have come, is a fair inference from the principle invoked by the plaintiff, that in cases like this, the abstract legal rights of the parties, should be controlled by the interests of agriculture.

For the reasons assigned, it is ordered, that the judgment in this case be reversed. It is further ordered, that the injunction be dissolved; and that there be judgment in favor of the defendant, with costs in both courts.

**EMMA BEAUREGARD, Wife of E. DELERY, v. HER HUSBAND and  
J. H. EIMER.**

The wife is not bound by her signature to a note, signed jointly with her husband, even at the suit of an innocent endorsee, unless it be proved that the consideration of the contract inured to her separate advantage. Nor will the acknowledgment of the wife, in the act of mortgage, that the money had been borrowed for her separate use, relieve such endorsee from the necessity of making that proof.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Lamb and Eustis*, for plaintiff. *Schmidt*, for defendants. By the Court:

ROST, J. *J. H. Eimer*, one of the defendants, discounted a note drawn by the plaintiff and her husband, *in solido*, and secured by a mortgage upon the paraphernal property of the plaintiff. She acknowledged, in the act of mortgage, that the proceeds of the note had been received by her for her own wants and personal affairs.

**BEAUREGARD**      The note was protested at maturity, and *Eimer* obtained an order of seizure  
**HER HUSBAND.**      and sale, which the plaintiff has enjoined, on the ground, that this is a debt of  
 her husband, for which she was without capacity to bind herself or her property.  
 The district judge perpetuated the injunction, and *Eimer* has appealed.

We are of opinion that the appellant has not made out a case, which can be considered an exception to the rule, that the wife is not bound, by her signature to a note, signed jointly with her husband, even at the suit of an innocent endorsee. *Sprigg v. Bossier*, 5 N. S. 55. *Gaalon v. Matherne*, 5 Ann. 496.

It is a principle which has come down to us from the laws of Spain, that he who contracts with a married woman, must show, affirmatively, that the contract turned to her advantage. The only exception under those laws was when the wife renounced, in due form, the 61 law of Toro. *Brogner v. Forstall*, 3 M. R. 577. *Chapillon v. St. Marent*, 5 M. R. 167. *Banks v. Trudeau*, 2 N. S. 39.

This exception no longer exists, and proof, that the consideration of the contract inured to the separate advantage of the wife, is, in all cases, necessary to destroy the legal presumption, that contracts entered into during marriage, jointly by the husband and wife, are the contracts of the husband. It has been frequently held, that the acknowledgment of the wife, in the act of mortgage, that the money had been borrowed for her separate use, did not dispense the creditor from making that proof. *Prudhomme v. Edens*, 6 R. R. 64. *Erwin v. McCalop*, 5 Ann. 173.

The circumstance of the wife having a separate advantage in the contract, is of the essence of the obligation, and must be proved before a recovery can be had upon it. *Brandegge v. Kerr and Wife*, 7 N. S. 64.

There is nothing inconsistent with this view of the law in the case of *Patterson v. Fraser and Wife*, 5 Ann. 586. *Mrs. Fraser* made her case stronger, by showing that the debts, which were to be satisfied out of the money borrowed, had not been paid. But the decision was put upon the ground, that the plaintiff had failed to show that the advances made by him had inured to her benefit. There might be cases of deceit and fraud on the part of the wife, in which she would be held liable, but this is not one of them. It was incumbent upon the plaintiff to ascertain the uses for which the money was borrowed, and to see that it was applied in such a manner, as would subject the separate estate of the wife to the payment of it. As he failed to do so, and there is nothing in the record to show the use made of it, the judgment must be affirmed.

The judgment is affirmed, with costs.

### JOHN RUGELY v. JAMES GOODLOE & CO.

Rule of damages where defendant is in good faith. C. C. 1928, a. 1.

If the contract on which the action is brought, is annexed to or made a part of the petition, an objection to the introduction of it in evidence, on the ground of variance, cannot be sustained.

In a contract for the performance of work, the omission to state the time at which it is to be completed, is an incident which the court will supply according to equity, usage and law : and testimony may be received of those facts and circumstances which tend to show the time for its completion, which the parties may be presumed to have had in view.

**A**PP<sup>EAL</sup> from the Second District Court of New Orleans. The case was tried by a jury before *Lea, J. Elmore and King*, for plaintiff. *G. B. Duncan*, for defendants. By the court :

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v.  
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*Paxton, J.* The plaintiff is a sugar planter in Matagorda county, in the State of Texas ; the defendants, manufacturers of sugar mills and engines, in Cincinnati, which they also put up on southern plantations.

On the 14th of February, 1850, they entered into an agreement that the defendants should build and put into operation, on the plantation of the plaintiff, a sugar mill and engine, particularly described in the agreement, with all the necessary pumps and pipes to make the work complete. They agreed to have the mill and engine delivered in New Orleans on or before the 1st day of June, 1850. On the other hand, the plaintiff agreed to have it transported to his plantation within sixty days from the time it was landed in New Orleans, to supply the necessary brick work and timber for putting up the mill and engine, and to furnish a suitable number of hands to assist in putting them up ; and the defendants agreed to put them up, in complete running order, on the plantation of the plaintiff. In consideration of the premises, the plaintiff agreed to pay, and has paid, the defendants four thousand one hundred dollars.

The plaintiff alleges, that the defendants failed to comply with their contract ; that he thereby lost one-half of his sugar crop of 1850, equal to an hundred hogheads of sugar, worth upwards of five thousand dollars, and claims damages to that amount.

The defendants admit the payment of the price of the mill and engine ; deny that they were bound to execute the work at any particular time ; allege that they pushed the work with all possible diligence, and complied with their contract without any unavoidable delay, and that the plaintiff lost nothing by their fault or negligence ; but, if he lost any part of his crop, it was by his own delays in not providing for the seasonable delivery of the mill on his plantation ; in not being prepared for putting it up when they were ready to perform their part of the contract, and in not having a sufficient quantity of seasoned wood to manufacture his sugar when the mill and engine were put into operation.

The case was tried by a jury, who rendered a verdict for three thousand dollars damages in favor of the plaintiff, and the defendants have appealed.

The plaintiff alleged, that the defendants were bound by their contract to complete the mill and engine by the 20th of October, 1850. He offered in evidence the contract, which contained no such clause. The defendants opposed its introduction in evidence, because it was not the contract upon which the plaintiff declared or rather varied in terms from the allegations in his petition. The court submitted it in evidence, and they excepted.

The plaintiff had annexed his contract with the defendants to his petition, as part thereof. The defendants were thereby perfectly apprised of the contract upon which they were sued, and suffered no surprise by the offer of it in evidence. The allegations in the plaintiff's petition amount substantially to his interpretation of the contract, upon the correctness of which interpretation it was for the court and jury to decide. The bill of exceptions to the introduction of the contract in evidence is not, therefore, tenable.

The plaintiff offered verbal evidence to show, that planters commence taking off the sugar crops, in the part of Texas where he resides, from the 10th to the 20th of October ; that it is dangerous, from the probability of frost, to delay it longer ; that one of the defendants had been in Texas about the time the negotiation for the mill and engine was commenced, became acquainted with the

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extent of the plaintiff's crop, the necessity of that early commencement to secure it, and, of course, to have the mill and engine ready for that purpose; and that the contract for the mill and engine was made for taking off the ensuing crop of the plaintiff, and with a full knowledge and view of these necessities. Testimony on these subjects was opposed, as tending not only to vary but add to the contract of the parties, and as being forbidden by article 2256 of the Civil Code.

No precise time was specified in the written contract, at which the mill and engine should be put up and in operation; and yet it was to be put up and in operation some time. Now, equity, usage and law, supply in contracts such incidents as the parties may reasonably be supposed to have been silent upon, from a knowledge that they would be supplied from one of these sources. Civil Code, art. 1959.

We cannot doubt, from a perusal of the contract itself, from the fact that the machinery was to be delivered in New Orleans by the 1st of June, and to be transported to the plaintiff's plantation within sixty days afterwards, that the mill and engine was intended by both parties to take off the plaintiff's ensuing crop of sugar. All this testimony offered and objected to, was proper, therefore, to show at what time it was necessary to have the mill and engine put into operation in order to take off that crop, that is, to accomplish the object for which the plaintiff engaged and agreed to pay for them, and to show that the time within which they were to be completed, was perfectly within the knowledge and understanding of both parties, though not expressed in the agreement; and the testimony fully satisfies us, that it was the understanding of the parties, and the duty of the defendants in pursuance thereof, that the mill and engine should be put up and in operation at least by the 20th of October, 1850, to enable the plaintiff, like all other planters in that vicinity, to commence taking off his crop by that day, because the commencement could not be protracted beyond that time, without danger of losing the crop by frosts.

The voluminous testimony furnished by the plaintiff, shows that he fully complied with his contract; that he transported the machinery to his plantation so as to afford ample time to have enabled the defendants to put it up before the proper season for taking off the crop; that he had every thing necessary for the defendants, prepared by the 1st of August, 1850, when their workmen arrived on the plantation, and was ready and anxious to afford them every facility to comply with their contract; urged it all in his power, and warned their agent of the dangers of delay, and that he would look to the defendants for indemnification, if he lost his crop in consequence of their failure to have the mill and engine ready for the grinding season. The foreman and workmen arrived in time to have completed every thing in due season, but soon afterwards left the work in an incomplete state, and did not return until the 1st of November. The excuse was, that it was necessary to go to Galveston to make some changes in a pipe. The plaintiff proves that it was not necessary to go to Galveston for that purpose; that if it was, he offered to send and have the change made, which could have been done, and that a very temporary absence of the foreman, at all events, would have been sufficient for the purpose. That instead of speedily going to Galveston, making the alterations and returning, the foreman went to and remained at other places.

In consequence of the delay, the mill and engine were not put into operation until the 11th of November, 1850. A killing frost came on the night of the 4th or 5th of December, before the plaintiff had been able to take off half of his crop, and destroyed nearly one-half of it. It was fully proved, that if the mill

and engine had been completed by the 20th of October, the plaintiff would have saved his entire crop.

The effort of the defendants, to show that the plaintiff's loss was caused by the want of a sufficient quantity of seasoned wood to take off his crop, has entirely failed. Rarely has a case been so clearly made out, that the damages were caused by the defendants.

The loss to the plaintiff, is clearly proved to have been caused by the faults and negligence of the defendants in failing to comply with their contract, and they are bound to indemnify the plaintiff.

The jury did not, as urged by their counsel, charge the defendants with the value, in New Orleans, of the sugar lost, which would have exceeded five thousand dollars, but with only three thousand dollars, the probable value on the plantation, of the lost sugar, after deducting the expenses of manufacturing it.

The agreement of the parties was violated passively, no doubt, and without bad faith, but by sheer negligence on behalf of the defendants. What, then, is the rule of damages? Those which may reasonably be supposed to have entered into the contemplation of the parties at the time of contract. Code, art. 1928, No. 1. The making of the crop, and the means of making it, were the very things contemplated by the parties in making the contract; the loss of the crop, the thing which they intended to guard against, and that loss, was the damage reasonably entering into their contemplation if the contract was broken.

It becomes unnecessary, therefore, closely to scrutinize the charge of the court to the jury, though, at first view, we cannot say it was erroneous.

The judgment of the district court is therefore affirmed, with costs.

### PICKERSGILL & Co. v. BROWN.

By the terms of a judicial sale, purchasers were, in substance, required to take the property subject to so much of the antichresis as might be due, and such of the recorded mortgages as, upon investigation, should turn out to be *bona fide*. Held: Under such description of the interest, its value was altogether undefined. It is the right of the debtor, under the law, that his property should be sold at a certain price. Here the price was uncertain—it was not sold for so much over the amount of mortgages stated in the certificates, but a bid for so much money, subject to such amounts as might be *bona fide* and really due under them. The sale was, therefore, defective.

In judicial sales, there must be a definite description of the thing sold. The law will not countenance their being made lotteries, at the bidding, and sources of confusion and strife afterwards.

Where a creditor causes a sale of an indefinite and uncertain interest in property; becomes the purchaser, under a title defective on its face; takes no possession of the thing purchased, and no ratification of the proceedings is shown to have been made by the defendant in execution—in an action by the purchaser, restraining a mortgagee from the enjoyment of his apparent rights in the property, and calling upon him to account, it is competent for the mortgagee to set up the defects in the judicial sale under which the purchaser claims.

Subsequent mortgagees have the right to dispute any prior mortgage, and to inquire into its validity and amount. They have also the right to ascertain, by action, whether apparent contracts, made between their debtors and other persons, are real, or mere fraudulent simulations. They have also a right, subject to the limitation which the law has prescribed, to an action for the avoidance of contracts, which, although they are real and sincere, were made in fraud of their rights as creditors.

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v.  
GOODLOE.

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| 7   | 297  |
| 47  | 204  |
| 7   | 297  |
| 48  | 330  |
| 49  | 1246 |
| 7   | 297  |
| 118 | 626  |
| 7   | 297  |
| 122 | 735  |

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Mortgages, under the hypothecary system of Louisiana, may be given to secure debts having no legal existence at the date of the mortgage. It is not essential, in such a mortgage, even with respect to third persons, that it should express on its face, that it was executed to secure future debts. It may be described as a security for existing debts, and yet used to protect those which, in the contemplation of the parties, were to be created at a future time.

A creditor, under an act of antichresis, is bound to make useful and necessary repairs of the pledged estate. But he will not be permitted to make improvements of a new, unusual and expensive character. If he do, he cannot insist on being reimbursed the amount which these improvements may have cost, but only their actual value to the estate. The consent of the debtor to improvements of the latter description, estops him from complaint. If a debtor, who is secured by antichresis, agree with his creditor to appropriate the revenues in a manner different from that prescribed in the act, by which the antichresis was created, a mortgage creditor, who has not put his mortgage in action, cannot complain.

**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Grymes and Roselius*, for plaintiffs. *Benjamin and Micou, and Levi Pierce*, for defendant. By the court:

SLIDELL, J. The plaintiffs represent in their petition, that they hold three judgments against *P. M. Lapice*, amounting in principal and interest, to upwards of \$100,000, rendered in the years 1844 and 1846, and recorded in the year 1844, and subsequently, in the parishes of St. James and Concordia; that, on the 28th April, 1842, *Lapice* executed a mortgage in favor of *James Brown*, for an amount of \$250,000, and on the 12th May, of that year, another mortgage in his favor for the amount of \$150,000; that, on the 3d of May, 1842, *Brown* obtained a judgment, in the first judicial district, for \$250,000, upon *Lapice's* obligations for that amount, being the same recited in the mortgage of that date; that the mortgages and judgment covered all the lands and slaves owned by *Lapice*; that, on the 30th May, 1843, *Lapice* executed, in favor of *Brown*, an act of pledge, by way of antichresis, of the same lands, to secure the above amount of \$400,000, in which *Brown* acknowledged possession, and covenanted to appropriate the fruits and monies to the payment of his claims and interest.

The petition further represents, that *W. C. Pickersgill* had purchased, in 1850, under an execution issued upon one of the judgments in his favor, "the equity of redemption" of *Lapice* in and to all the plantations and slaves, and that, as such purchaser, he stands in relation to that property in the place of *Lapice*.

The petition further alleges, that *James Brown* has caused executions to issue upon the judgment for \$250,000, and has levied upon the plantations and slaves, and is about to cause them to be sold, under pretence of satisfying the judgment. It charges, that the proposed sale is intended to cut off "the right of redemption," and under cover of the imposing amount of debt apparently due, to preclude competitions and prostrate the creditors of *Lapice*; that these acts of *Brown* are intended for the sole benefit of *Lapice*, and to enable him to elude his creditors; that he has an understanding with *Brown*, and that the executions will result to *Lapice's* benefit.

The petitioners further charge, that the plantations have, since the date of the antichresis, produced a large amount of fruits and revenues, so as to have wholly or in great part, paid the debt to *Brown*.

They further charge, that the debt, although ostensibly originating in a loan of \$400,000, was not for an actual advance of that sum in cash, but in stocks, bonds, or other papers, at their nominal or par value, which was greatly above their market value; and that other devices were used, of a usurious character,



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to increase the amount of said loan beyond its true value in money; that the granting of the mortgages, the confession of judgment, and the antichresis, were intended as means by which *Lapice* might frustrate his creditors; that the judgment is null, because, when it was rendered, there was no debt due by *Lapice*; and, when it was confessed, it was clearly understood between the parties, that it was not to be enforced or executed as a judgment, but was only to stand as security for the debt, if any existed; and certain terms of credit were to be allowed *Lapice*, as appears from the subsequent act of antichresis, into which the mortgages and judgment were merged, by which they were controlled.

The petitioners further charge, that *Lapice* still remained in the possession of the property, notwithstanding the antichresis, and has been permitted to expend a large portion of the revenues arising therefrom, in vast and extravagant improvements and embellishments, beyond what was necessary for the preservation and cultivation of the estates, for the sole benefit of *Lapice*, and to the injury of his creditors; that "the right of redemption" cannot be exercised against the mortgages, judgment, and pledge held by *Brown*, without an exact account and knowledge of the amount due to him.

The prayer of the petition is, that *Brown* be decreed: 1st. To file a just and true account of all the monies and things advanced by him, showing in what, whether money or other things, the loan consisted. 2. To file an accurate and true account of the gross amount of fruits and revenues of the plantations and slaves, showing the disposition made of them; how much for necessary purposes; how much for other improvements, and how much had been applied to the extinguishment of the loan, principal or interest. 3. An accurate and true copy of the account kept by him, between himself and *Lapice*, since his first advance of money; to the end that the plaintiff might be informed of the true amount of indebtedness of *Lapice*, and might be enabled to say what real and subsisting lien or mortgage *Brown* has upon *Lapice's* property, and that the debt may be reduced to its proper and just amount, and the plaintiffs allowed to pay off the same.

The petition concludes with a prayer for general relief and an injunction, and also that *Brown* answer, under oath, certain interrogatories annexed to the petition.

In his answer, the defendant asserts the justice of the debt, and his right to execute the judgment; produces his accounts with *Lapice*; denies all the allegations of the petition, tending to invalidate his rights under the act of mortgage, the judgment, and the antichresis. He also pleads prescription, and prays a dissolution of the injunction with damages, &c. He filed his sworn answers to the interrogatories.

The nature of the interrogatories and answers will be best understood by stating them at length. They are as follows:

1. Did you make a loan of four hundred thousand dollars to *Peter M. Lapice*, at any time between the 28th, day of April, 1842, and the 13th day of May, 1843. If you did, then state and set forth the date at which such loan was actually made?

If the loan was not made all at one time, then set forth the date at which each separate sum was advanced or paid?

2. Was the whole sum of four hundred thousand dollars advanced or paid over to the said *Lapice* in person, or was it disbursed, and paid out by you, or any agent of yours, in the payment or extinguishment of debts due by said

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*Lapice* to others, or incumbrances, or liens, upon his property? If it, or any part of it, was paid out and disbursed by you or any agent, or agents of yours, then state who so paid the same, and to whom was it paid; in payment of what debt, or in extinguishment of what lien or incumbrance, and how much to each individual.

3. Was the loan so made to the said *Lapice*, or the monies so advanced to him, or paid to his creditors, made or paid in cash, coin, or circulating bank notes; or was any portion of it so advanced to said *Lapice*, or paid for him to others, advanced or paid in any species of paper other than current bank notes, redeemable on demand in specie? Was any portion of it advanced or paid in any description of stocks or bonds of any State, or bank, or of any individuals, or any other description of paper or credits; in fact, in any thing but gold or silver coin, or current circulating bank notes, convertible into coin on demand? If yea, then set forth particularly what part or portion of said advance, or the payments so made, were in such stocks, bonds, or paper, credited. To whom were such stocks, bonds, or paper credits paid, in payment of what debt, or extinguishment of what lien or incumbrance? Were they advanced or delivered to the said *Lapice*, or paid away to others at their par or nominal value, or at a discount? If at a discount, then at what rate? What was the cash value of any such paper in the markets of New York or other cities of the United States or elsewhere, at the time they were so advanced or paid out? Were they not at a discount? If yea, what was the rate of discount? Set forth your whole knowledge in relation to the matters embraced in this interrogatory, as fully as if herein specially and more particularly interrogated.

4. What has been the gross yearly revenue of fruits arising, year by year, from the four plantations and slaves, and all the other property pledged to you by way of antichresis, by the deed of antichresis, executed to you by the said *Lapice* on the 13th of May, 1843, from the date of the said act up to the time of answering this interrogatory? Annex to your answer a true and accurate account thereof, and say, on your oath, if the same be a true and accurate account.

5. If, in answer to the last interrogatory, you furnish any account, or state any amount, then state whether the account or sum so stated comprises all the crops, fruits, or revenues actually grown or gathered from the said property, or only such as have come to your hands, or those of your agent or agents? And if anything more was actually grown upon or gathered from said property; then state into whose hands the same passed, for what purpose, and how it was disposed of? and, particularly, set forth whether any part or portion thereof was retained, held, or came to the hands of the said *P. M. Lapice*, and if any was retained, or came to the hands of said *Lapice*, then say how much? Of what it consisted, and what was its value.

6. What is now the state of the account between you and the said *Lapice*? Annex the account to your answer, and say whether it is a true and just account, embracing all and every description of transactions between you and the said *Lapice*, directly or indirectly?

7. How have the fruits, revenues, and crops of all the said property, since the 13th day of May, 1843, been applied? State, particularly, how much thereof has been applied to the ordinary expenses of all the said plantations; what extraordinary improvements, additions, and erections in mills, houses, and steam apparatus, or of what nature or kind has been made, and what portion of said crops, fruits, and revenues have been applied to that purpose, and what portion thereof has been applied to the credit of your debt; annex to your answer a just

and true account, showing, distinctly, what has been expended under each of the above heads. PICKERSELL  
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8. Has not the said *Peter M. Lapice*, ever since the said 13th day of May, 1843, resided, alternately, upon some one or all of the said plantations mentioned in the deed of antichresis of that date? Has he not had the sole or chief management, direction, cultivation, and superintendence thereof? Has he not been permitted, since that period, to expend large sums of money thereon in the erection of new buildings, new sugar works, new steam apparatus for the manufacture of sugar, and many other things of the like nature? What was the cost of each and every such improvement, building, or other apparatus, and what was the aggregate amount of the whole? Does it not greatly exceed the usual and ordinary expenses for maintaining and cultivating such plantations? Does not the expenditure, for this purpose, amount to or exceed one hundred thousand dollars? And was not the whole of that expenditure made from the crops, fruits, and revenues accruing during the period aforesaid? Set forth the same in detail, and as particularly as if herein more specially interrogated.

9. You being in the actual possession of all the said lands, plantations and slaves, and in the free and uninterrupted enjoyment of all the rents, issues, and profits arising therefrom, until the full and entire reimbursement of your loan to said *Lapice*, in principal and interest, by virtue of the deed of antichresis aforesaid, what was your motive, object, or intention, or that of your agent, in issuing an execution on the judgment conferred to you by the said *P. M. Lapice*, on the 3d day of May, 1842, for two hundred and fifty thousand dollars, a part and parcel of said loan? Set forth, specially, what was your object, motive, and intention? Was it not to favor the said *Lapice*? Was it not to aid and assist him to hinder and obstruct his other creditors, and these petitioners in particular, and to prevent their pursuing or meddling with the said property, or to render the equity of redemption of the said *Lapice*, which they, or any of them, had, or might acquire, of no value? Was not this step taken with a view to the ultimate benefit of the said *Lapice*? Had you, or your agent, any agreement with the said *Lapice*, or any understanding with him, express or tacit, on the subject? If yea, then set forth the same fully, according to your whole knowledge and information? Have you had any correspondence with your agents in New Orleans, or with the said *P. M. Lapice*, on the matter? If yea, annex to your answers copies of all letters you may have received from either, and all you have written, or caused to be written, and say whether they are true copies, and all you have so received or written?

10. When you or your agent caused the said execution to issue, and the lands, plantations, and slaves aforesaid to be levied upon and advertised for sale under the same, was it your *bond fide* intention to take advantage of your position and the large amount of your debt, to cut off the equity of redemption of the said *Lapice*, or of any creditor who might become subrogated to his rights to vest the legal title to said lands, plantations, and slaves, in yourself, for your own exclusive benefit, and without any regard to the future rights, benefit or interests of said *Lapice*, or any one claiming under him? Set forth fully and at large, what was your object, intention, or purpose?

11. Did you intend, at any sale made under the said execution, to permit the said property to pass into the hands of any third person, for a less sum than the full amount of your debt and interest due at the time of such sale?

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To the First Interrogatory : I answer, that I did make a loan to *Peter M. Lapice*, exceeding four hundred thousand dollars, principal and interest, through my firm *Brown, Brothers & Co.*, of the city of New York. In this loan there was included a balance of an account due by *P. M. Lapice*. The remainder thereof was made in various sums and at different times, between the 26th day of April, 1842, and the 13th day of May, 1843, partly in cash, and partly in bonds, which were taken as cash at the market value thereof, or at the value which the same were actually worth to the said *Lapice*.

The accounts hereto annexed, marked A, 1, 2 and 3, and which I believe to be correct, show the particular dates when such loans were made, and what portion thereof was made in bonds, and what portion in cash, (the drafts therein mentioned having been paid in cash,) and I refer to the same as containing a more full answer to this interrogatory.

To Second Interrogatory : I answer, that the whole sum of four hundred thousand dollars was not advanced or paid over to the said *Lapice* in person. It was, however, all paid and delivered to him either in person or upon his order, and for his use and benefit.

To the Third Interrogatory : I answer, that the aforesaid loan was made partly in cash, and partly in bonds, which were taken as cash at the market value thereof, or at the value which the same were actually worth at the time, to the said *Lapice*. Such price or value will appear by reference to the aforesaid accounts marked A, 1, 2 and 3. The drafts mentioned in the said accounts were all paid either in gold or silver coin, or in circulating bank notes, redeemable on demand.

To the Fourth Interrogatory : I answer, that the credit side of the several accounts hereto annexed marked B, 1, 2 and 3 ; C, 1, 2 and 3 ; D, 1, 2 and 3 ; E, 1, 2 and 3 ; F, 1, 2 and 3 ; G, 1, 2 and 3 ; and H, 1, 2 and 3, (which form part of my answer to this and the other interrogatories,) show, to the best of my knowledge and belief, the gross yearly revenue or fruits arising, year by year, from the plantations and slaves in this interrogatory mentioned and referred to, from the date of the deed of antichresis down to the first of November, 1850. I am unable to state the gross revenue or fruits thereof, if any, for the present year, for the reason, that the books containing the accounts thereof are kept by my agent, *Samuel Nicholson*, in New Orleans, and I have not at present any means of access thereto, nor have I copies or other extracts therefrom.

To the Fifth Interrogatory : I answer, that the accounts hereto annexed comprise, to the best of my knowledge and belief, all the crops, fruits, or revenues actually grown or gathered from the said property, down to the said first of November, 1850 ; that if any other crops, fruits or revenues were grown or gathered from the said property, the same have not been received by me or my agent to my knowledge or belief. I do not know that any portion of such proceeds came or went into the hands of *P. M. Lapice*. I think no part thereof ever came or went into his hands, but that all of the same was received by my said agent.

To the Sixth Interrogatory : I answer, that I am unable to answer this interrogatory, otherwise than, at the last annual account, on the 1st day of November, 1850, there remained a balance due to me from the said *Lapice*, upon the aforesaid loan, after making all just credits, of \$742,626 01, as will appear by reference to the account, which is hereto annexed and marked H, No. 3. To the best of my knowledge and belief, the accounts hereto annexed, are just and

true accounts of all the transactions between the said *Lapice* and myself, down to the date last aforesaid. PICKENSILL

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To the Seventh Interrogatory : I answer, that the net proceeds of the fruits, revenues and crops, of all the property pledged, since the 13th May, 1843, after deducting the payment of the expenses and disbursements thereon, and on account thereof, (which are herein, and in the accounts thereto annexed, mentioned and referred to,) have been justly, truly and properly applied in, and towards, the payment and satisfaction of the aforesaid loan. I cannot state farther or more particularly, than I have stated in and by these my answers, and in and by the several accounts hereto annexed, what portion of the said crops, fruits and revenues has been applied to the ordinary or extraordinary expenses of the plantations. Nor can I state further, than I have elsewhere in these answers stated, what improvements, additions, and erections of mills, houses and steam apparatus, have been made since the period last stated ; but whatever may have been made, I believe to have been necessary or otherwise proper, as I have hereinafter more particularly stated.

To the Eighth Interrogatory : I answer, that *Peter M. Lapice*, has generally resided since the 13th May, 1843, on the St. James sugar plantation ; but he has not had the sole or chief management, direction, cultivation and superintendence thereof. The management and control of the sugar plantation, were had by my agent, *J. Delamar*, and the cotton plantation by my agent, *J. M. Lapice*. It is true, that the long experience and capacity of *Peter M. Lapice*, were such as to induce me, through my agent, to consult him on important matters connected with the management of said sugar plantation, its cultivation and the manufacture of sugar ; and it is true, that great weight was attached to his counsel and advice on these subjects, the more especially, as he was to receive back the plantations after the payment of my claim, and consequently, was greatly interested in making them productive. But said *Lapice* did not reside on any one of the cotton plantations, nor had he the least control or management of them. It is true, that large sums of money have been expended in the erection of a new sugar house, and in the furnishing of a new apparatus for making sugar on said plantation, and the cost was certainly greater than the "usual and ordinary expenses for maintaining and cultivating said plantation," but it was not greater than, in my judgment and opinion, was necessary for making the plantation as productive as I could. These improvements were exclusively projected and devoted to augmenting the revenues of said sugar plantation, and not to embellishments of any kind. They were the same in nature and intent, as those made at the same period by several other large planters in this State, and which have since been generally adopted on sugar plantations ; and without them, the revenue and produce of said plantation, would have fallen far short of what they actually were. I cannot state the precise sums expended for each and every improvement, building or apparatus, further or otherwise, than is contained in the several accounts relating thereto, which are hereto annexed ; from which said cost, as well as the total expenditures, can, as I suppose and believe, be readily ascertained. On the cotton plantations, no expenditures were incurred for improvements, buildings or apparatus, beyond the usual and ordinary expenditures for maintaining and cultivating said plantations.

To the Ninth Interrogatory : I answer, that my motive, object and intention in issuing the execution referred to in this interrogatory, was not to favor said *Lapice*, but to make the amount of my debt. My motive and object, were not

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to aid and assist him, to hinder and obstruct his other creditors or the petitioners, nor had I any reference to the interests of the other creditors, but I regarded my own only. I had no agreement or understanding with *Peter M. Lapice* on the subject, nor any correspondence on the matter. In further explanation of my motives, I will say, that I had become satisfied that the property pledged to me, was not more than sufficient, even if sufficient, to pay my claim. That the extreme desire always expressed by *Peter M. Lapice* to pay his creditors, had induced me, year after year, to continue without enforcing payment, so as to leave him the chance of paying me with the revenues, and thereby becoming able to satisfy all his other creditors. That his strong hope of success in the project, induced me to lend every indulgence in my power, and that when the petitioners sold out his equity of redemption, and became themselves the owners, there no longer existed in my mind the same motive for indulgence, and I determined to bring the business at once to a close.

To the Tenth Interrogatory : I answer, that my intention, prior to the seizure and sale of *Lapice's* equity of redemption, was to indulge him as long as I possibly could in the effort to pay me by the revenues of the plantations, and thus acquire the means of paying his other creditors ; also, that this motive no longer existed when the petitioners became the owners of the equity of redemption, and that then my intention in taking out the execution, was to make my claim good in the best way I could, for my own exclusive benefit, and without any regard to the future rights, benefit or interest of said *Lapice*, or any one claiming under him.

To the Eleventh Interrogatory : I answer, that I had not made up my mind how far I would go, in bidding on the plantations at the sale. I should have exercised my discretion on the day of sale, through my agent ; and I therefore neither intended to permit nor to prevent the property to pass into the hands of any third person, for a less sum than the amount of my debt and interest due at the time of said sale ; I had formed no intention whatever on the subject.

It will be observed, that the petitioners claim in the double character of purchasers of the so called equity of redemption, and as judgment creditors.

We will first consider the rights acquired under that purchase ; the disposition of that subject will tend to simplify the subsequent investigations.

The deed under which *W. C. Pickersgill*, one of the plaintiffs, claims, is a deed executed by the Marshal of the United States, for the Eastern District of Louisiana, acting under a writ of *fiery facias*, issued upon a judgment in the suit of *W. C. Pickersgill v. P. M. Lapice*. It recites, that under the writ he had seized "the equity of redemption and all the rights, titles or interests in reversion or otherwise, which the said *P. M. Lapice* has, or may have, in and to the following property," describing the plantations and slaves in the parishes of St. James and Concordia, as described in the antichresis, the rights aforesaid, "being his equity of redemption in the lands, plantations and slaves, as described and pledged to the said *James Brown*, by said act of antichresis ; and all his right, title and interest in all and every of the said lands, plantations and slaves, in reversion or otherwise, after the payment of the sum of \$400,000 to the said *James Brown*, as stipulated in the said act of antichresis, or such part thereof as may be due at the time of the sale, and after the extinguishment of all *bona fide* mortgages, that may actually be due and recorded in said parishes of Concordia and St. James, previous to the judicial mortgage of the plaintiff, arising from the record of this judgment in said parishes ;" and, after due notices and advertisements, exposed the property for sale at the St. Louis Exchange, in New

Orleans, on the 30th March, 1850, when the said equity of redemption and other rights, &c., were adjudicated to *W. C. Pickersgill*, the plaintiff, for the price of three thousand five hundred dollars. The certificates of mortgage in the two parishes are declared to have been read at the sale, and annexed to the return of the writ.

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Various grounds of invalidity have been presented by the defendant against this title; but we deem it unnecessary to notice any other than those which relate to the indefinite information given at the sale, as to the extent of the debtor's interest, and to the uncertainty of the price. The mortgage certificate exhibited incumbrances to an amount exceeding one million of dollars. Purchasers then, as has been correctly argued, were, in substance, required, by the terms of sale, to take the property, subject to so much of the antichresis as might be due, and such of the recorded mortgages as, upon investigation, shall turn out to be *bond fide*. Under such a description of the interest, its value was altogether undefined; and it will be observed, that the language was calculated to raise doubts and conjectures in the minds of bidders, without supplying any means, at the time of the bidding, by which such doubts could be solved, or such conjectures confined within any reasonable limits. It was an inuendo that the whole debt named in the antichresis was not due, and that some of the mortgages were unreal. The tendency of such a suggestion would obviously be, to mystify the uninformed, check that fair competition which, in the interest of the debtor, the law contemplates, and enable one, or a few, to speculate upon their private information, to the exclusion of others, and the sacrifice of the defendant in execution.

Again, it is the right of the debtor, under the law, that his property should be sold at a certain price. Here the price was uncertain. It was not for so much over the amounts of mortgages stated in the certificate, but a bid for so much money, subject to such amounts as might be *bond fide* and really due under them. If the bid had been for a sum over and above the amount of the recorded mortgages, then the amounts of those mortgages, added to the amount of the bid, would have formed the total price to be paid by the purchaser, for the thing sold. The amount of the mortgages would be considered, by the law, as so much of the price retained in the purchaser's hands to meet them; and in case it turned out afterwards that any of the mortgages had been paid, or were unlawful simulations, the purchaser would owe their amount to the judgment debtor. See C. P. 683. *Trudeau v. McVickers*, 1 Ann. 427. *Rowley v. Rowley*, 19 L. R. 576.

The decisions on the subject of invalidities in judicial sales, are numerous; and the current of authority is uniform in support of the general doctrine, that the law will not countenance their being made lotteries at the bidding, and sources of confusion and strife afterwards. See *McDonogh v. Gravier*, 9 L. R. 542. *McGary v. Dunn*, 1 Ann. 338. *Gates v. Christy*, 4 Ann. 294.

It is true that the present defendant, who invokes the nullity of the judicial sale, does so collaterally, and is not the defendant in execution. But we are of opinion that he has a right to do so under the circumstances of the present case, his apparent rights being attacked, and he called upon to account to one holding a title which is defective on its face, and unaccompanied by possession. For it will be observed, that the ownership of the lands and slaves was in *Lapice*, (as we shall presently notice more particularly,) no seizure of them was made by the marshal, nor was there any tradition but of the naked instrument of conveyance, nor is any ratification or acquiescence by *Lapice* shown. How far others

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than the defendant in execution, or his assigns, can set up the nullity or irregularities of a judicial sale, against a purchaser whose purchase is aided by possession, is a question not involved in this cause.

We shall, therefore, lay out of view the judicial purchase of the so called equity of redemption, and consider the plaintiffs merely in the character of judgment creditors, having judicial mortgages upon the lands and slaves of *Lapice*.

In that character, they have the right to dispute any prior mortgage, and inquire into its validity and amount. They have, also, a right to ascertain, by action, whether apparent contracts made between their debtors and other persons are real, or mere fraudulent simulations. They have, also, a right, subject to such limitations as the law has prescribed, and an action for the avoidance of contracts which, though they are real and sincere, were made in fraud of their rights as creditors. Of the latter class of actions, we will have occasion to speak more particularly hereafter.

Before we proceed to consider the various legal grounds upon which the apparent rights of the defendant, as a mortgage creditor of *Lapice*, are disputed, it is necessary here to notice certain matters of fact, which are material, in that investigation.

The mortgage of the 28th April, 1842, on its face, purports to be made to secure a loan of \$250,000, made to *Lapice* by *Brown* on that day, and for which he gave his obligation to the order of *Brown*, payable on demand, and bearing interest at the rate of eight per cent per annum from date until final payment. Upon this obligation a judgment was confessed on the 3d of May, 1842. The mortgage of the 12th May, 1842, recites the former loan, and on its face purports to be made to secure "a further loan of \$150,000, being the amount of sundry promissory notes drawn by him, the said *Lapice*, paid by the said *Brown*, and other advances made by him for the accommodation of *Lapice*, which sum he hereby acknowledges to have received from the said *Brown*, in the manner aforesaid, and hereby binds himself to pay and reimburse at any time hereafter, and whenever the same shall be demanded, with interest thereon, at the rate of eight per cent per annum from the day of the date hereof until final payment; and to that effect, the said appearer has furnished a certain bond or obligation, by himself subscribed, dated this day, made to the order of the said *James Brown*, for the said sum of \$150,000, payable on demand, bearing interest at the rate of eight per cent per annum, from date, until final payment," &c. The act also contained a covenant by *Lapice*, to ship his crops to defendant's house "so long as *Lapice* shall continue to be indebted to said *Brown*, and stipulated in his favor a lien upon them." But, while such was the language of these instruments, it clearly results from the evidence, that in point of fact these bonds, mortgages and assignments, were intended by the parties to be, and were, taken and held by *Brown*, as securities for what was already due by *Lapice* in account current, and for what should thereafter become due in like manner, by reason of contemplated advances. Such would have been decreed to be the true state of the case, if at any time. for example, say on the 13th May, 1842, *Brown* had sued *Lapice* upon the two bonds nakedly, and *Lapice* had set up in defence the true nature of the transactions.

Now the plaintiffs insist, that from an analysis of the accounts produced, under oath, by the defendant, the amount due him on the 12th May, 1842, was not \$400,000, but was at most only \$228,971 38. On the other hand, the defendant admits, that these accounts do not show an indebtedness of \$400,000 on the 12th May, 1842; but, he says they show further advances from the 12th



May to the 9th June, 1842, of upwards of \$200,000; that the account A. 2, shows a cash balance on the 30th November, 1842, of \$401,865 44, and the account A. 3, a cash balance on the 30th November, 1843, of \$453,072 91, &c.

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Such being the circumstances of the case, the legal propositions, presented by the parties, stand thus: Your mortgages, say the plaintiffs, purport to be for loans and advances already made. They must be confined, therefore, to these existing loans and advances. Your advances posterior to 12th May, 1842, are unprotected by mortgage. On the other hand, the defendant argues, that as the mortgages and judgment were, in fact, taken not only as securities for existing advances, but such advances as might thereafter be made, so that the defendant should be covered in account current up to the amount and interest therein expressed, his right to avail himself of them, as such securities, is not impaired by the language in which the securities were expressed, and extends as well to the subsequent as to the antecedent advances.

These propositions involve two question of law: can a mortgage, under our hypothecary system, be given to secure debts having no legal existence at the date of the mortgage? If so, is it essential, as regards third persons, that the applicability of the mortgages to future debts, should be expressed on its face, or may it be created, in the form of a security, for an obligation described as actually existing?

Upon both these points, our opinion is clearly with the defendant.

The general definition of mortgage, contained in the 3257th article of our Civil Code, supposes the existence of a principal obligation, of which the mortgage is an accessory, and such is the general theory implied in article 3251. But inasmuch as such a theory, strictly construed, would be inadequate to all the practical purposes of business and the necessities of commerce, the lawgiver, in article 3259, has allowed the conventional mortgage a wider range, by declaring, that it "may be given for an obligation which has not yet risen into existence; as when a man grants a mortgage, by way of security, for endorsements which another promises to make for him."

The argument of one of the counsel for the plaintiffs, was based upon a construction of this article, which gave perhaps too much weight to the illustration, at the expense of the broad language of the rule.

That argument, as we understand it, turned upon the theory, that unless there was a binding promise to make the loan at a future day, the mortgage must be considered null; that the mortgage would, in such case, depend upon a potestative condition, for the mortgagee might afterwards refuse to lend, or the mortgagor to borrow; so that there was no contemporaneous principal obligation, upon which the mortgage could attach. This theory is not a new one, and involves difficulties, which the framers of the code, perhaps, intended to put at rest, when they introduced the article 3259 into the amendments of the Code of 1808. The doubts, the refinements, and the controversies in which learned minds have been involved, on this subject of potestative conditions, considered in relation to mortgages, may be seen by consulting the French and other commentaries. See Merlin, Questions de Droit, Hypothèque, § 3. Troplong, Hypothèque, No. 474, *et seq.* and the authorities there cited.

But whatever be the soundness of the argument in the abstract, it must be observed here, that it assumes a state of facts inconsistent with the contemporaneous understanding of the parties, as fairly deducible from the whole aspect of the case presented by the record. Their acts create a reasonable presump-

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tion, that their understanding was, that *Brown* should advance, and *Lapice* borrow, to an amount of \$400,000, to be thrown into account current to be kept by *Brown*, who, through his agent in New Orleans, was to have the consignment of *Lapice's* crops, and act as his factor. At first, the parties seem to have supposed \$250,000 would be a sufficient margin, but they subsequently enlarged it to \$400,000, as shown by the second mortgage of May 12th; sometime previous to which, they had begun arrangements with regard to a settlement of *Lapice's* debt to the Merchants' Bank, which alone amounted to more than \$100,000. And, although *Lapice* had not received an actual advance to the whole amount of \$400,000 on that day, there is no reasonable doubt upon our minds, that it was well understood he should have it, and that *Brown* could not, without a breach of good faith, have refused it. This reasonable inference, from the acts of the parties down to the 12th May, is fully supported by the events which followed within a reasonable time, and before the mortgages held by the plaintiffs came into being.

With regard to the question of the availability of these securities, to protect the advances made by *Brown* before the date of the first judicial mortgage obtained by the plaintiffs, there is, in our opinion, no room for controversy. The further question, whether these securities protect the account current in its subsequent movement, is not so free from difficulty; but after carefully considering this question, with reference to the broad language of our code, the commercial facilities which it may be fairly considered as contemplating; the decisions of the French Courts upon a state of legislation, not more favorable to the pretensions of the defendant than our own; the form in which the mortgage obligations were taken; and the fact, that advances, up to their amount, were actually made before the plaintiffs acquired their judicial mortgage; we are of opinion, that the account current and its eventual balance, is protected by these securities up to the amount, with interest, which those securities represent. See the discussion of this subject in *Molinier's Treatise on Commercial Law*, No. 226, p. 203 to 209, and the reasons given in the cases of *Felemey c. Bonifay*, *Sirey et Villeneuve*, 1841, 2, p. 521, *Ib.* p. 540, also *Syndics Perrichon, c. Costaz et comp. Dalloz*, 1848, 1, p. 234. *Hildebrand c. Courcelles*, *Sirey et Villeneuve*, 1848, 2, p. 728.

If, therefore, these mortgages had been made in express terms to secure such balance of account as was then due, and such advances as might thereafter be made in account current, up to a fixed amount, it seems to us clear, that the defendant would be protected by them. But the plaintiffs insist upon the strict words of those contracts; denounce them as false and fraudulent simulations, in declaring that they are given for loans already made; and contend, that as such, the mortgages are inoperative against them.

That any fraud was intended by taking the mortgages in this form, is unsupported by the evidence, and cannot be justly inferred from the surrounding circumstances. We consider the case, upon this point, as presenting a naked question of law, upon which the authorities are clearly in favor of the defendant.

In *Brander v. Bowman and Abercrombie*, 16 L. R. 371, the true consideration was not stated in the act of mortgage. In it *Bowman* acknowledged himself indebted to *Abercrombie* in the sum of \$10,135, for which he executed his promissory note, and mortgaged a plantation. The plaintiffs, creditors of *Bowman*, brought an action to annul the mortgage, and subject the property to a judgment

they had subsequently obtained against *Bowman*. They charged fraud and simulation. The district judge gave judgment in favor of *Abercrombie* for \$1983 53, as being the only amount which *Bowman* owed him at the time the mortgage was executed, and rejected the balance. *Abercrombie* appealed, and obtained judgment for the whole amount, as a mortgage creditor. The opinion is thus given by the court after stating the facts.

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"In the present case, the plaintiffs resorted to interrogatories, for the purpose of establishing, from the answers of both defendants, not only the facts of fraud and simulation alleged in the petition, but also the undue preference stated to have been given by *Bowman* to *Abercrombie*, with a knowledge, on the part of the latter, of *Bowman's* state of insolvency; but we think he has failed in his attempt. From the answer of both defendants, it results, that the act of mortgage attacked was executed for a valuable consideration, in this: That a part of the amount was really due at the time, and the balance was to secure certain endorsements or security debts which *Abercrombie* had contracted for *Bowman*, and which he was bound to pay one and two years afterwards; the transaction is fully explained in *Abercrombie's* answer to the first interrogatory, and no evidence has been adduced to contradict it. It is true, that the evidence found in the record, shows that *Bowman* owed a great many debts at the time he executed the mortgage, and was perhaps in insolvent circumstances; but, far from there being any proof to bring home a knowledge of the facts to *Abercrombie*, his answers to interrogatories show, that *Bowman* concealed the state of his affairs from him; and again no evidence has been adduced to the contrary.

In this state of the case, the district judge thought that *Abercrombie* was entitled to recover the amount actually due him, by *Bowman*, at the time of the execution of the mortgage, and allowed him a preference over the plaintiffs for said amount, to be satisfied out of the property mortgaged. But, we think, he erred in not allowing him the benefit of the whole. It is perfectly clear, that "a mortgage may be given for an obligation which has not yet risen into existence, as when a man grants a mortgage by way of security, for endorsements which another promises to make for him." Louisiana Code, art. 3259. 8 Mart., N. S. 529. Here the endorsements had actually been made; and, as we are bound to believe, from the answers of *Abercrombie* to the interrogatories propounded to him by plaintiffs, which answers stand uncontradicted, that the contract of mortgage complained of was in good faith, we see no reason why the effect of said mortgage should not be extended to the whole of the debt."

Thus, we see it was held, in that case, that the mortgage was valid, although the consideration recited was not the real one, there being another lawful consideration proved.

There is a case reported in Dalloz, which, while it is pertinent to other questions involved in this cause, is very satisfactory on the particular point we are now considering. The facts were, that in 1839 *Perrichon*, in a notarial act, acknowledged himself to be indebted to the house of *Costaz & Co.* in the sum of forty thousand francs, being, as expressed in the act, for a loan of that amount previously made to him by that firm, which he promised to pay at fixed dates. He mortgaged real estate to secure this debt. In 1841, he became insolvent. *Costaz & Co.* claimed a mortgage rank for 40,000 francs, in virtue of this instrument and its registry. The syndic of the insolvent opposed the claim, on the ground that the mortgage was only available for the indebtedness existing at its execution; that by the account current between the parties, it appeared that

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payment had been made, the amount of which should be imputed to the hypothecary obligation, which was thus extinguished. They also contend, that the inscription was null, for want of an exact indication of the true nature of the debt, and the period at which it was exigible. *Costaz & Co.*, on the other hand, contended that the mortgage under which they claimed, had been, in truth, given to serve as a security, not only of such amounts as were due to the house at its date, but for the eventual balance in account current, so that neither the obligation nor the mortgage were extinguished by the mere fluctuation of the account current; and that, as to the inscription, the information it contained relative to the date, nature, and exigibility of the debt, was sufficient, notwithstanding the variance from the true nature of the agreement between the parties, to enlighten third persons as to the incumbrances on the debtor's property, and protect them from being deceived.

The tribunal of Bourgoin declared the mortgage ineffectual, upon the ground, among others, of the variance of the ostensible contract from the real agreement of the parties. But this decree was reversed by the court of Grenoble; and, on further appeal, the latter judgment was sustained by the court of last resort. In its opinion, the court of Grenoble decided the particular point in question, substantially upon these grounds: That in the consideration of contracts, the common intention of the parties must be sought for; that from the circumstances of the case, and the manner in which the parties had executed their contract, the conviction was irresistible that, although *Perrichon* acknowledged himself to be a debtor, purely and simply, to *Costaz & Co.*, in a sum of 40,000 francs, which he promised to pay at an early day, yet the parties really understood that the obligation was to serve as a mortgage security, not only for what was then due, but for what might eventually be due in account current; that the manner in which the account current was kept, was in accordance with this understanding; that such an agreement was not a just subject of complaint, in a legal aspect, because parties may adopt such forms as suit them to protect their agreements, even when such forms seem to conflict with them, provided their real intentions can be appreciated, and they do nothing that offends the laws, good morals and public order; and, that as regards third persons, they suffered no injury by such an agreement, because persons dealing with *Perrichon*, after the contract of 1839, having notice of the registry of the notarial act, were thus informed of all they had an interest to know, to wit, that the real estate of *Perrichon* was affected by an incumbrance for 40,000 francs. Mr. Troplong, as "*conseiller rapporteur*," thus practically treated the question: Quant aux reproches faits par le demandeur à l'inscription relativement à la date et à la nature de la dette, au montant du capital, à l'époque de l'exigibilité, il oublie que l'inscription contient toutes les mentions voulues par la loi, et que s'il y a quelque différence entre l'inscription et le titre, ce n'est pas une raison pour annuler l'inscription, surtout lorsqu'il n'en résulte aucun préjudice aux créanciers. Car, point de préjudice; ils n'ont pas été induits en erreur, ils n'ont pas été trompés. The views of Troplong and of the court of Grenoble were clearly adopted by the court of last resort. Considérant que la cour d'appel de Grenoble, en interprétant le contrat du 6 Mars, 1839, d'après la correspondance et l'exécution donnée à cet acte, y a vu, non pas un prêt pur et simple de 40,000 fr., mais une sûreté hypothécaire pour solde final d'un compte courant, jusqu'à concurrence de ladite somme; — qu'en cela, elle n'a fait qu'user d'un droit souverain et consacrer des conventions parfaitement légitimes; — que cette interprétation, bien que donnant à l'acte un sens

réel, différent du sens apparent, n'enlève à la convention d'hypothèque aucune de ses conditions essentielles; — que cette hypothèque s'est manifestée par une inscription revêtue de toutes les formalités légales, et qui a suffisamment éclairé les tiers sur les ressources du débiteur, et prévenu toute surprise possible; — que vainement on insiste pour soutenir que, dans le flux et le reflux du compte courant, il a pu arriver un moment où les sommes prêtées ont été compensées par des sommes rendues, et que, dans cette hypothèse, l'hypothèque manquerait de cause; — qu'en matière de compte courant, il n'est pas permis, tant que ce compte n'est pas clos définitivement, de compenser tel article du crédit par tel article du débit; — qu'en effet, ce serait l'arrêter pendant qu'il court encore; — qu'il faut faire une masse de toutes les opérations successives jusqu'à conclusion, et que c'est seulement à cette époque qu'on peut décider s'il y a un créancier ou s'il n'y en a pas; — qu'en procédant d'après ces règles, la Cour d'appel, loin de violer aucune loi, a fait, au contraire, la plus juste application des principes de la matière; — rejette.

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At this stage of our inquiries, it is proper to notice an objection raised on the score of usury, to a very important item of the advances.

The account rendered 30th November, 1843, exhibits, as we have stated, a cash balance on that day of \$453,072 91. A portion of the advances of which it was composed, consists of \$107,428 32 for Planters' Bank bonds, charged to *Lapice* at ten per cent below the par amount of their face and interest; instead of which amount, the plaintiffs say he could only have been lawfully charged \$61,394, that being, say they, the value of the bonds at that time, at fifty cents on the dollar, which rate a witness, *Barker*, says was the market rate of those obligations.

The transaction, as explained by the witness, was this: *Lapice* was indebted to the Merchants' Bank of New Orleans in a sum exceeding, with interest, \$100,000. He made an agreement with the bank to receive from him, in payment of this debt, bonds of the Planters' Bank of Mississippi at par. The bank then transferred *Lapice's* notes to *H. Bean & Co.*, (of which firm the witness, *Barker*, was a member) with the agreement, that they should comply with the stipulations made with *Lapice*. The bonds were then furnished by *Brown's* agent to *Lapice*, and the debt was thus paid (with subrogation) to *Bean & Co.* Thus *Lapice* got the bonds at 90 cents on the dollar, and used them in payment of his own debt at par. It is not proved that the Planters' Bank was insolvent, and ultimately failed to meet its obligations, nor that the bonds in question were not worth as much to *Brown* as *Lapice* promised to pay for them. It is clear, that *Lapice* has long since lost the rights, as between himself and *Brown*, of opening this transaction on the score of usury.

Upon this branch of the cause the defendant's counsel have argued, that his mortgage rights cannot be questioned by the plaintiffs.

1st. Because, under the decision of this court, in the *Bank of Louisiana v. Briscoe*, 3 Ann. 157, which, it is said covers the present case, the transaction could not be pronounced usurious.

2d. That the question of usury has been long since put at rest between the original parties, by the settlements of account from year to year, and the prescription established by the Act of 1844.

3d. Because, the revocatory action which the law accords to creditors, is limited to the evidence of contracts made in fraud of creditors, and resulting in injury to them, and that the acceptance of a usurious loan is not such a contract

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as can be reached or interfered with by third persons; that the revocatory action requires proof of a fraudulent concert between the debtor and the person with whom he has contracted; and that the law never contemplated the placing of the debtor in a state of pupillage, so that his contracts might be supervised by his creditors, and he thus protected from his own imprudence.

4th. That the revocatory action is prescribed by one year, dating, in cases of mere preference, from the act complained of, and in cases of fraud to the injury of a creditor from the date of his judgment against the debtor.

Without deciding upon all these points, it is sufficient to say, that the fourth point is well taken. The defendant, if otherwise assailable, is protected by prescription. The first judgment, recited in the petition of the plaintiffs, was obtained in 1844, the two others in 1846. The citation in this cause was served in April, 1850. See Civil Code, arts. 1982, 1989.

The same remarks apply to other items of inferior magnitude referred to by counsel.

We come now to the consideration of the antichresis, and of the account since its creation. And, with regard to these accounts, we have first to remark, that the defendant was called upon to produce them, under oath; that he has so produced them; and, therefore, as the district judge did, we are to take them as true, in the absence of any evidence impeaching their veracity.

This act of antichresis was executed on the 13th May, 1843. It refers to the obligations and acts of mortgage of April and May, 1842; declares, that such payments as *Lapice* had made, on account of them, were not more than equal to the interest due thereon, and that his indebtedness still amounts to the sum of \$400,000, which he acknowledges to be the amount due at the date of the act of antichresis. He declares, that it is his desire to secure payment of the interest that may hereafter accrue on the obligations, covered by the mortgages, and also to give additional security for the payment of the obligations themselves; and that, therefore, without in any manner impairing the full force and effect of the two mortgages he transfers, pledges, &c., to *Brown*, by way of antichresis, the crops, revenues, &c., of the plantations, slaves, mills, &c., being the same described in the mortgages. *Brown*, by his agent, *Nicholson*, acknowledges possession of the property. It was agreed, that it was to remain pledged in antichresis, until the said debt of \$400,000, with interest from the date of the antichresis, should be wholly paid by *Lapice*, or until it should be paid out of the crops and revenues of the property so pledged. It was also agreed, that *Brown* was to be allowed, out of the crops, for all taxes and annual charges, and for the keeping, and useful and necessary repairs and improvements of the estates, the maintenance of the slaves, horses, cattle, &c., and for all other necessary and unavoidable expenses for the raising of crops and working the mills.

It was said, that the astounding fact meets us at the threshold of this investigation, that a claim of \$400,000, for which the antichresis was granted on the 13th May, 1843, instead of being diminished by the crops yielded by the estates during about seven years, and amounting to a sum of \$531,884 32, has swelled, on the 1st November, 1849, to a cash balance of \$744,445 91.

Although on the face of the antichresis it appears, that \$400,000 was then the amount of the debt, (the effect of which recital we shall hereafter have occasion to consider,) yet in point of fact, the cash balance of the account, if it had been struck on that day, would have presented an amount larger by about \$50,000. It must also be observed that, after the date of the antichresis, a sum,

which the plaintiffs state at upwards of \$120,000, was expended in establishing on one of the sugar estates machinery for refining sugar. Another new item, which figures in the account in principal and interest, as stated by the plaintiffs, at \$168,795 18, arose from the settlement, by *Brown*, of large prior incumbrances held by the Union Bank and other creditors. When to these, and other large new advances, we add the cost of plantation supplies, salaries, factor's commissions, &c., and take into view the accruing interest, which was also compounded by striking annual balances, and renditions of account annually, approved by *Lapice*, the augmentation of the debt, under the antichresis, is explained.

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But the plaintiffs contend for a different imputation of payments, from that adopted by the parties, and also urge, that the large amounts expended for improvements, should be stricken from the accounts. "All the extravagant expenditures incurred by *Brown*," we quote the language of counsel in their printed argument, "or rather by *Lapice*, since the date of the antichresis, must be disallowed, so far as the rights of third parties are concerned; a man who is so utterly ruined, according to his own representations, as to be obliged to pledge all his property, in order to diminish his debt by means of the revenues of his estates, cannot be permitted to run into wild speculations, in the establishment of sugar refineries, &c., amounting to hundreds of thousands of dollars; much less can the favorite creditor, to whom an act of antichresis has been granted, squander the revenues of the property, from year to year, in making costly experiments, under the pretext of increasing the productiveness, with a view, the sooner to extinguish the debt for which the antichresis was granted. If no other parties than *Lapice* and *Brown* were interested in the matter, they might do what they thought proper; but a court of justice will not sanction such scandalous proceedings, when they are carried on at the expense and to the detriment of honest creditors, who have been so unfortunate as to have placed confidence in a man who has so shamefully abused that confidence."

The motive of *Brown* in making these disbursements, is stated in his answers to interrogatories; and his statement is not contradicted by other evidence. His opinion, as to their expediency, is also there given; and it appears from other testimony in the cause, that this opinion was an honest one, and was adopted, after sending an agent to Cuba to see the working of similar apparatus there, and judge of the expediency of adopting it; by which agent, a favorable report was made. Whether these so called improvements in the manufacture of sugar exhibit, in general, results commensurate to the expensive outlay which they involve, is a question upon which, as the testimony shows, planters differ; but that this money was disbursed by the defendant, is very cogent evidence of his conviction, that it would be of advantage to the property, in the productiveness of which he had an enormous interest. An intention to injure creditors, cannot be reasonably inferred from his course in this matter.

While the creditor, who holds property on antichresis, is bound to make useful and necessary repairs of the pledged estate, (Civil Code, 3144) it seems, on the other hand, to be well settled doctrine, that he is not permitted, as such creditor, to effect improvements of a new, expensive and unusual character, or which materially change the mode of cultivating or using the estate granted in antichresis. If he do so, he is considered as doing an injustice to the proprietor, in making his withdrawal of the property more onerous. He would not be allowed the absolute reimbursement of his outlay, but could, it seems, at most, recover only the increased value actually given by such improvements or change,

PICKENS v. BROWN. See Troplong Nantissement, No. 543. But when the debtor consents, there is, as between him and the grantee, no reason for complaint.

*Lapice's* consent to this use of the proceeds of the crops, having been conclusively shown, year after year, by his written approval of the annual accounts rendered, is it competent for the plaintiffs, at this late day, to dispute that application? That they cannot do so, results from a proper appreciation of the different nature of the contracts of mortgage and antichresis.

A mortgage in favor of one creditor, not put into action by *feri facias* or writ of seizure, may coexist with an antichresis in favor of another creditor. The antichresis operates upon the fruits, which the creditor, holding it, is thereby authorized, by his debtor, to gather. A mortgage affects the land. If the holder of the antichresis gathers the fruits before the mortgage creditor seizes, he can apply them to his debt. Just as the owner himself would have held the gathered fruits free from the mortgage, had he granted no antichresis. The creditor in antichresis, when he has gathered the fruits, owes his account to the owner, and not to the inactive mortgagee. But having agreed with the owner, to whom alone he is bound to account, to apply the proceeds of the gathered crops to his debt, he and the owner are obviously free to waive that application and use them in some other way. The owner might have spent them as he pleased, if he had not granted the antichresis; and the creditor in antichresis may, at his request, do the same. To illustrate the case in a simple form, suppose A gives to B in antichresis a slave, which he afterwards mortgaged to C. It is agreed that B shall hire out the slave, collect his wages, apply ten per cent of them to clothing the slave, and the residue to the payment of A's debt to him. B extravagantly spends twenty per cent of the wages received, in clothing the slave, credits the balance upon the debt, and renders to A an account showing such application, which A approves. Can C, who has not made a seizure, afterwards complain, and open this account? Clearly not.

It is charged, in the petition, that the antichresis was intended to obstruct and frustrate the plaintiffs in the collection of their debts. We do not find this charge sustained by the evidence; and, we may add, if such had been the desire of *Lapice*, and the defendant had been willing to lend himself to such a purpose, they chose, in this form of contract, a very inefficient means to such an end. For creditors are free to cut it off by levying a *feri facias*. Civil Code 3148. Troplong Nantissement, No. 573, 585. By this simple remedy, the plaintiffs could have annihilated the antichresis years ago. Our remarks on the subject of prescription, also apply to this branch of the case.

The district judge adopted the accounts rendered to *Lapice*, and which have been filed, in this cause, as correct in point of verity; but he reformed them on various grounds.

One was, that compound interest was not to be allowed. The accounts were annually stated, and the balance of interest, was carried into the account as a part of the principal bearing interest for the next year. This mode of establishing a compounding of interest, was considered and approved in *Thompson v. Mylne*, 4 Ann. 210.

He also opened and separated portions of the account, in consequence of a view he took of the mortgage securities and judgment, in which we are unable to concur. He considered the mortgage of 28th April, 1842, as only securing debts of *Lapice* to *Brown*, existing anterior to 3d May, 1842, when judgment was confessed upon the obligations of \$250,000, recited in that mortgage. He also



considered the mortgage of 12th May, 1842, as covering, only to the amount of \$150,000, payments for and advances made to *Lapice* by *Brown*, between 3d May, 1842, and 13th May, 1843, date of the antichresis, deducting from their amount the intermediate credits.

We have already stated, that these mortgages and mortgage obligations were really taken as security for advances made, and to be made, in account current; and the confession of judgment was nothing more than a cumulative security, adding a judgment to the mortgage which already protected the obligation of \$250,000. We see no reason why a confession of judgment may not be taken as security. In *Toledano v. Relf*, we recently had an example of that mode of taking security, in which we saw nothing illegal. We must not confound the debt in account current, with the obligations taken as security for that debt. They are as distinct as they would have been if, instead of giving these mortgage obligations as security, *Lapice* had pledged to *Brown* the mortgage obligations of third persons. Viewed in this light, the embarrassment disappears. That this was the light in which the parties considered the matter, is plain. And hence it was that, in the entire account current, from beginning to end, these two obligations, for \$250,000 and \$150,000, are never charged, but are wholly left out of the account, precisely as was done by the parties in *Perrichon v. Costaz & Co.*

What, then, is the effect of these securities? Clearly, to protect the defendant by mortgage to an amount of \$400,000, and interest at eight per cent thereon.

We do not consider that the antichresis, which was taken as additional security, impairs the mortgage securities, except in this respect, that it declared the interest on these obligations, up to the date of the antichresis, had been paid. As to third persons disputing his mortgage rights, *Brown* is estopped by that acknowledgment, improvidently made and recorded in the mortgage offices; although between himself and *Lapice*, as debtor and creditor, the mistake is rectified by the account current.

We are of opinion, therefore, that the mortgages stand as securities for *Lapice's* debt to *Brown*, in account current, to an amount of \$400,000, and interest thereon at eight per cent per annum, from the 13th of May, 1843, such being the amount inscribed in the mortgage offices.

The claim and mortgages of the defendant carry eight per cent interest; and, under the statutes, the imposition of damages is not imperative. We do not think this a case, all the circumstances considered, in which damages should be imposed.

It is therefore decreed, that the judgment of the district court be reversed, and that the plaintiff pay the costs of this appeal. It is further decreed, that the said *James Brown* was, on the 1st day of November, 1850, a creditor of *Peter Michel Lapice*, for the sum of \$742,626 01, with interest thereon at the rate of eight per centum per annum, from the 30th day of November, 1850, until paid, subject to any credits in favor of said debtor realized since said 1st of November, 1850, and costs of suit No. —, of the docket of the Fifth District Court of New Orleans, entitled *James Brown v. P. M. Lapice*. It is further decreed, that, for the security of the payment of the indebtedness aforesaid, the said *James Brown* has a conventional mortgage upon the lands, slaves and other property, described in the act of mortgage, executed, by the said *Peter M. Lapice*, to the said *James Brown*, on the 28th of April, 1842, and on the 12th

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of May, 1842, whereof copies are on file in this cause, up to an amount of \$400,000, with interest thereon at the rate of eight per centum per annum from the 13th day of May, 1843, until said mortgage be enforced by sale, or said indebtedness of *P. M. Lapice* be otherwise discharged; and that said conventional mortgage, so held by the said *James Brown*, is superior in rank to the judicial mortgages in favor of the plaintiffs, in their petition set forth; and must be satisfied by preference over said plaintiffs, out of said mortgaged property. It is further decreed, that the injunction issued in this cause, be dissolved, and that the said *Brown* have leave to proceed in the execution of the writ of *fieri facias* so enjoined; but that upon the claim of the said *Brown* for damages, there be judgment against him. It is further decreed, that the costs of this suit in the court below, be paid equally by said plaintiffs and said defendant, excepting those arising from the injunction, which are to be paid exclusively by said plaintiffs.

Appellee's counsel applied for a re-hearing.

We have quoted the whole argument on which the decision of this important question rests, for the purpose of beseeching the court to reexamine it once more, before the doctrine here enunciated, is finally incorporated into the jurisprudence of the State. There are certain general principles of law so obvious and plain, that it is inconceivable that any difference of opinion can possibly exist in their application. One of these principles is, that there can be no accessory obligation, without a subsisting principal obligation to which it is attached. Indeed, it is a contradiction in terms, to contend for the contrary. There is, surely, no refinement or subtlety in the position, that there can be no mortgage unless there be a legal obligation, a *vinculum juris*, whose performance is to be secured. This is not the theory of the Civil Code of Louisiana, or of any other code, either ancient or modern; but it necessarily results from the nature of things; for the existence of a mortgage, independent of a principal obligation, is a legal impossibility; and if the Legislature had said, in the broadest terms imaginable, that a mortgage may exist as an independent contract, would that have removed the legal impossibility? Certainly not. Our code does inform us, in three or four different articles, that a contract and an obligation are synonymous terms; but will any one, therefore, pretend that these legislative declarations have destroyed the distinction between the cause and the effect? So, if the framers of the code had undertaken to establish the rule, that a mortgage might be granted to secure an obligation which has not yet risen into existence, they would have said an idle thing, if a literal interpretation was to be given to their language. But it is perfectly evident that they have not been guilty of any such absurdity. The art. 3259 contains no new doctrine, nor any exception to that general principle, that a mortgage cannot exist as an independent contract. That article merely develops the rule laid down in the article immediately preceding it, which declares, "that a mortgage may be stipulated for the fulfilment of any obligation whatever, even for the completion of a deed." After having stated the rule in these general terms, the code proceeds:

"A mortgage may be given for an obligation, which has not yet risen into existence; as when a man grants a mortgage, by way of security, for endorsements which another promises to make for him.

"But the right of mortgage, in this case, shall only be realized in so far as the promise shall be carried into effect by the person making it. The fulfilment of the promise, however, shall impart to the mortgage a retrospective effect, to the time of the contract."

Now, with all due respect, we would ask, what is the meaning of the provisions of these two articles of the code? Do they introduce any innovation in jurisprudence, or do they widen the range of conventional mortgages, for the purpose of meeting the exigencies of practical business and of commerce? We humbly contend, that the framers of the code had no such object in view. On the contrary, the intention of the lawgiver is evident, and entirely consistent with the all pervading and unbending general principle on the subject; for he says, in terms not to be misunderstood, that there must be two distinct contracts, one of which gives rise to the principal obligation, the other, to the secondary;

the first is called the principal contract, by which one of the parties promises, i. e. obligates himself, to do some act for the other, whence a conditional obligation arises; but as long as the condition has not happened, on which the obligation depends, it (the obligation) has not yet risen into existence; the second is the accessory contract, i. e. the mortgage, to indemnify the party against the consequences of the obligation which may or may not arise from the principal contract. But if the principal contract produces no obligation, of course the accessory is likewise inoperative. We repeat, that these articles afford the strongest illustration of the general rule, instead of containing an exception to it.

The doctrine of potestative conditions, in relation to which so much has been written, and which has given rise to so much controversy, it is humbly submitted, has not the remotest application to the question involved in this suit.

We insist that *Brown* was under no legal obligation to make advances to *Lapice*, after the 12th May, 1842; and that nothing but a legal obligation can be the basis of a valid mortgage. And we most respectfully ask, where is the evidence of any such legal obligation on the part of *Brown*? It is said that the acts of the parties (*Brown* and *Lapice*) create a reasonable presumption that their understanding was, that *Brown* should advance, and *Lapice* borrow, to an amount of \$400,000, to be thrown into account current to be kept by *Brown*, who, through his agent in New Orleans, was to have the consignment of *Lapice's* crops, and act as his factor. At first the parties seem to have supposed \$250,000 would be a sufficient margin, but they subsequently enlarged it to \$400,000, as shown by the second mortgage of May 12, 1842, some time previous to which they had begun arrangements with regard to a settlement of *Lapice's* debts to the Merchants' Bank, which alone amounted to more than \$100,000; and although *Lapice* had not received an actual advance to the whole amount of \$400,000 on that day, there is no reasonable doubt on our mind, that it was well understood he should have it, and that *Brown* could not, without a breach of good faith, have refused it. This reasonable inference, from the acts of the parties, down to the 12th May, is fully supported by the events which followed within a reasonable time, and before the mortgage held by the plaintiffs came into being."

But it is clear that the question is not met by this view of the subject. With great deference to the opinion of the court, the question is not whether *Brown* could or could not, without a breach of good faith, have refused to make advances, but whether *Lapice* could have compelled him, by an action, to do so. On what ground would such an action have been sustained? How could *Lapice* have made out his case against *Brown*? Are there any facts disclosed in this record which would have enabled *Lapice* to bring such a suit? It is said that the whole aspect of the case leads to the conclusion, that *Brown* was under a moral, if not a legal, obligation to make the advances to *Lapice*. In our humble opinion, it is immaterial whether there was such a moral or equitable obligation or not, for an imperfect obligation cannot be the foundation of a mortgage.

Will the court permit us most respectfully to ask the question, from what acts of the parties, or from what other facts in the record, the reasonable inference of the existence of even an equitable obligation, on the part of *Brown*, to make further advances, can be drawn? Is it from the fact, that on the 28th April, 1842, *Lapice* and *Brown* both stated, in the act of mortgage, that the latter had lent to the former, on that day, two hundred and fifty thousand dollars? Or is it from the fact, that on the 12th of May, 1842, the parties again stated, in an authentic act, that *Brown* had made a further loan to *Lapice* of one hundred and fifty thousand dollars, being the amount of sundry promissory notes drawn by him, the said *Lapice*, and paid by the said *Brown*, and other advances made by him, the said *Brown*, for the accommodation of the said *Lapice*? Or is it from the fact, that on the 3d of May, 1842, *Lapice* confessed a judgment in favor of *Brown*, for two hundred and fifty thousand dollars, with interest at eight per cent per annum? Or is it from the fact, that on the 13th May, 1843, the statements contained in the two acts of mortgage and in the judgment confessed, are solemnly reiterated and re-asseverated in the act of antichresis? If the reasonable presumption spoken of can be drawn from these facts, either singly or collectively, then we must confess that we are utterly ignorant of the laws of ratiocination, and never have had the remotest conception of the power of logic. And what are the other facts to be found in the case, from which the reasonable inference can be drawn? The fact that *Brown*, through his agent, *Samuel*

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*Nicholson*, acted as the factor of *Lapice*, is certainly not of sufficient potency to gainsay the positive and unequivocal declarations of both *Brown* and *Lapice*, in the numerous acts referred to; besides, how can it be said that any reasonable inference can be drawn from this fact, that *Brown* obligated himself to make further advances, even if it was not flatly contradicted by the declarations of the parties themselves? What then remains? The solitary fact, that *Brown* did buy up *Lapice's* paper, at enormous discount, fifty cents in the dollar, after the 12th May, 1842! Now, if this fact alone leads to the reasonable inference, that this piece of unconscionable usury was the result of a legal obligation on the part of *Brown* to make future advances to *Lapice*, to which the mortgages can attach, then, we admit that our views in relation to this case have been erroneous from beginning to end.

With all the deference and respect which we unaffectedly entertain for the opinions pronounced by this honorable court, we cannot but believe that the legal doctrine, on which the judgment in the present case is founded, is not sound.

Let us now examine whether this doctrine receives any countenance from authority. The case of *Brander v. Bowman and Abercrombie*, 10 L. R. 371, is certainly not in point. That case merely applies the familiar principle, that although there can be no valid obligation without a legal cause or consideration, yet it is not necessary that the cause or consideration should be stated in the written act or instrument, by which the contract giving rise to the obligation is evinced; and that even when the cause stated is false, still, if the existence of a true cause can be proved, the obligation must be maintained. In that case, the court say, "From the answers of both defendants, it results that the act of mortgage attached was executed for a valuable consideration, in this, that a part of the amount was really due at the time, and the balance was to secure certain endorsement or security debts which *Abercrombie* had contracted for *Bowman*, and which he was bound to pay, one and two years afterwards. Under this state of facts, no possible objection could be made to the mortgage.

Nor does the view of the law adopted by the court, receive the slightest support from the case of *Perrichon v. Costaz et al.*, reported by Dalloz; for the leading feature in that case, as in *Brander v. Bowman and Abercrombie*, was, that though the cause stated in the act of mortgage was false, nevertheless the contract, and the obligation produced by it, were valid, because a true and sufficient cause was established by the evidence. The existence of the principal obligation, to which the mortgage attached, was found, as a matter of fact, by the Royal Court. Over that question the Court of Cassation, under the organization of the Judiciary Department in France, had no jurisdiction; hence, there could be no doubt of the validity of the mortgage.

The French tribunals never have, and, we are sure, never will decide, that a mortgage can have a legal existence, when there is no principal contract or obligation on which it leans for its support. And we are equally certain, that such an idea has never been advanced by any writer of authority, either ancient or modern.

Re-hearing refused.

## THE CONSOLIDATED ASSOCIATION OF THE PLANTERS OF LOUISIANA v. WILLIAM C. C. CLAIBORNE and Wife.

Although a corporation had expired by limitation, and judgment of forfeiture of charter had also been pronounced against it on behalf of the State; yet, where, from the nature and objects of the institution, a power to liquidate its affairs, after the expiration of its charter, might have been foreseen as absolutely necessary, the power to accept from the State an extension of the charter, for the purposes of liquidation, will be implied; and this extension enabled it to sue a defaulting stockholder, notwithstanding the enabling statute was passed subsequent both to the decree of forfeiture, and the expiration of the charter by limitation.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Benjamin and Micou*, for plaintiff. *J. R. Grymes*, for defendant. By the court :

CONSOLIDATED  
ASSOCIATION  
OF THE  
PLANTERS OF  
LOUISIANA  
v.  
CLAIRBORNE.

EUSTIS, C. J. This appeal is taken by the defendants, from a judgment of the Fourth District Court of New Orleans, by which they were condemned to pay, *in solido*, the sum of four hundred and twenty dollars, with interest.

The party plaintiff is one of the property banks of New Orleans, of which the State furnished the capital, by a sale of its bonds, which were based upon mortgages furnished by the stockholders. The defendants were stockholders of the bank, and the present action is for the recovery of an assessment of six dollars per share, imposed by the managers of the institution for the purpose of supplying a deficiency in the assets of the bank, which were found to be inadequate to meet the payment of its debts.

The amount of this contribution does not appear to be contested. The objections to the plaintiffs' right to recover, appear to be founded on the legislation to which this corporation has been subjected, and on its present condition under the existing laws.

The corporation was chartered by two acts of the Legislature, passed, one on the 16th of March, 1827, the other, on the 19th of February, 1828. Its charter was to expire on the 30th of June, 1843.

By a judgment of a competent court, dated the 17th of November, 1842, its charter, at the suit of the State, was decreed to be forfeited.

It is contended, on behalf of the defendants, that, from these two causes, the corporation has become extinct, and the contract between the State and the stockholders, and the stockholders *inter se*, has been thereby dissolved.

The right of the principal defendant to an immediate liquidation of the affairs of the bank, is insisted upon, and the consequent release of his property from the burthen of mortgage.

This case is, in some of its features, similar to that of the *Citizens' Bank v. The Levee Cotton Press Company*. But there is an important difference between the two cases. In that case, the term to which the payment of the bonds was extended, was within that fixed for the duration of the charter of the bank, and within the time at which the other series of bonds were due. It is otherwise in the present case, as will be noted.

The State took possession of the assets of this bank, under the decree of the forfeiture of its charter, by virtue of the acts of 1842 and 1843, for the purpose of liquidating its affairs; and managers were appointed under the authority of the State.

The capital of the bank was furnished by the negotiation of State bonds, payable in five, ten and fifteen years from their date; and the stockholders mortgaged their property to secure the payment of these bonds, and their interest.

In 1835, a law was passed, authorizing the bank to postpone the payment of the two last series of bonds, to the 30th of June, 1848, and granting to it a delay of two years from that date, for purposes of liquidation.

The defendant became a stockholder in 1839. The bonds of the State were not paid at maturity, and were renewed, under the provisions of the act of 1847. Under this act, three directors were appointed by the stockholders of the bank, who, with the managers, on the part of the State, had the administration of the affairs of the bank. By the 4th section, they were authorized to extend the

**CONSOLIDATED ASSOCIATION OF THE PLANTERS OF LOUISIANA v. CLAIBORNE.** term of payment of the State bonds for 6, 9, 12, 15 and 18 years, provided, however, that the stockholders should be at liberty to discharge them sooner ; and the liquidation of the bank was authorized to be continued, until the payment of the bonds thus extended.

By the 6th section. an assessment on the stockholders was authorized, in order to meet regularly the interest and principal of these bonds as they fell due. For a contribution, under this section, the present action is brought.

The term fixed by the charter for the duration and liquidation of the bank, having expired, the question presented, relates to the effect of the act of 1847, as obligatory upon the defendant. That he is bound for his share in any deficiency of the assets of the bank to meet its debts, is conceded ; but the defence is, that he is not bound in manner and form as sought to be made liable ; not bound by the protracted liquidation imposed by the act of 1847.

When we consider the objects of this institution, and the condition of the bank, resulting from the manner in which its capital is invested, (for the most part, in mortgages on sugar estates and slaves,) it must be conceded, that the power of liquidating its affairs, at the expiration of the charter, was one of those which were absolutely necessary, for the protection of the interests of the stockholders. It certainly would be reasonable to foresee, and within the contemplation of every stockholder, when he took his stock, that it might be impossible to effect this liquidation within the extended time fixed by the statute, to wit, two years from June 30th, 1848.

If this be so, and we do not conceive how it can well be otherwise, the corporation had the power to accept, from the State, the privilege of the extension of the charter, for the purposes of liquidation.

The State gave the privilege of extension ; the holders of ninety-five per cent of the stock, have acquiesced in the law conferring it ; and the corporation has actually accepted it. For the acceptance of an amendment to a charter, we do not understand that any particular form is prescribed by the law. But, it is clear, that the acts of the corporation itself, and of nearly the whole of the stockholders, as corporators, under the law, are equivalent to the most formal acceptance.

The State has determined, the bank has determined, with the concurrence of more than nine-tenths of the stockholders, that it is for the interest of all not to force a liquidation immediately ; but, in view of the condition of the country, and of the affairs of the bank, to postpone the payment of the bonds, for which it is bound, for terms extending from three to eighteen years, and have thus organized a gradual liquidation.

This may be too long, perhaps it is ; but, has this court the power to coerce an immediate liquidation, at the instance of a dissenting stockholder ? We think not.

It is proper to add, that a portion of the court, in concurring in the present decree, has been materially influenced by the last consideration, very forcibly stated in the opinion of the district judge. •

The judgment of the district court is therefore affirmed, with costs.

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## I. CLEMENT CAMP v. THE CHURCH WARDENS OF THE CHURCH OF ST. LOUIS AND J. P. KIRWAN.

The Wardens of the Church of St. Louis employed *Kirwan* to rebuild the cathedral, under the direction and superintendence of their architect, according to plans agreed upon. *Kirwan* employed the plaintiff as his master bricklayer. Owing to some defect in the plan, work or materials, and without any fault of plaintiff, a tower fell and inflicted on him a severe injury. He sued both *Kirwan* and the Church Wardens for damages, and a jury rendered a verdict against defendants, *in solido*, for \$2500. On appeal, the verdict was sustained.

The general rule of law is, that a principal is liable to third persons for the torts, neglects and omissions of duty of his agent, in the course of his employment.

Those provisions of law which render the owner of a building liable for the damage occasioned by its ruin, resulting from a vice in its original construction, or from neglect to repair it, are entirely independent of the general rules concerning the responsibilities of masters and employers; they are evidently founded in an enlightened view of public necessity; they protect the neighbor and the passenger in the street, and it would be singular, indeed, if the men at work on the building were excluded from their just and salutary operation. Per *Eustis*. C. J.

In an ordinary case, where a landholder makes a contract with an undertaker to erect buildings on his land, and in the performance of the work, by the undertaker, an accident occurs to an individual, whether a passer by or a person laboring at work; the landholder who has not resumed possession, and who has used reasonable diligence to select a discreet and competent undertaker, is not answerable to the person injured. Whatever responsibility there may be for such accident, is thrown upon the undertaker, by the article 2739 of the Civil Code.

Sut, where the landowner retains a continuous and active direction and control over the work, he is answerable for an injury sustained by a workman, in consequence of its defectiveness. Per *Stidell*, J.

The responsibility which articles 2299 and 2302 create against the master and house-owner, is of the same nature and degree. As a general rule, under these articles, the master and house-owner are alike responsible for slight neglect.

The plaintiff having been employed as master mason, by the contractor, *Kirwan*, stands towards the house-owners and contractor as if he had been employed by themselves. They were bound only to use ordinary diligence in the selection of their architect and their builder; and as the men selected had been long engaged in those pursuits, and had the reputation of being persons every way competent to the task, due diligence was used; an action, therefore, cannot be maintained against them.

A master is not responsible to his servant, for an injury sustained by such servant, in consequence of the negligence of a fellow servant, provided the servant injured was, at the time, acting in his master's service, and the servant causing the injury was a person of ordinary skill and care. Per *Rost*, J., *Preston*, J., concurring.

**A** PPEAL from the Second District Court of New Orleans, *Lea*, J.  
*Cyprien Dufour* and *P. C. Cuvelier*, for plaintiff. The plaintiff contends that both defendants are responsible, jointly and *in solido*, unto him, for the damage which he has suffered, and he bases his action upon the following propositions: 1. Every act whatever of man that causes damage to another, obliges him by whose fault it happened, to repair it. C. C. La. art. 2294. C. N. art. 1382. 2. Every person is responsible for the damage he occasions, not merely by his act, but by his negligence, his imprudence or his want of skill. C. C. La. art. 2295. C. N. art. 1383. 3. We are responsible not only for the damage occasioned by our own acts, but for that which is caused by the act of persons for whom we are responsible, or of things which we have in our custody. C. C.

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La. art. 2296. Masters and employers are answerable for the damages occasioned by their servants and overseers, in the exercise of the functions in which they are employed. C. C. La. art. 2299. C. N. art. 1384. 4. The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction. C. C. La. art. 2302. C. N. art. 1386. 5. Corporations are bound by the acts of their agents, when these do not exceed the limits of the administration which it entrusted to them. C. C. La. art. 430.

In addition to the articles herein cited, the counsel for plaintiff beg leave to call the court's attention to the following list of authorities: Toullier, liv. 3. tit. 4. *Des engagements qui se forment sans convention*. Domat, Loix Civiles, liv. 2, tit. 8. Delvincourt, tome 2, p. 452. Dalloz, *verbo Responsabilité*. Duranton, tome 13, No. 729. Malleville, sur l'article 1386. Favard, *verbo Delits* and *quasi Delits*. Pothier, Obligations, No. 116 à 453. Starkie on Evidence, *verbo Nuisance*. Merlin Répertoire *verbo Quasi*, 10. lb. *Domage*. Journal du Palais, vol. 10 (1812) page 908. Power—c.—Moreau. As to the measure of damages the counsel refer to: Greenleaf on Evidence vol. 2, *verbo Damage*; to the case of *Brown v. Ponchartrain Railroad Company*, 8 R. R. 45, and to the case of *Carnatz v. The Mexican Gulf Railroad Company*, lately decided by this honorable court and not yet reported.

*Durant* and *Roselius*, for *Kirwan*. What was the relation of the parties in this suit. The Church Wardens were the owners, and the employers of *Kirwan*, directing and binding him to build their cathedral under the superintendence of *Depouilly*, architect. *Camp*, plaintiff, was employed by *Kirwan*. Now, admitting that, under the legal principle here laid down, *Kirwan* is liable for all damages caused by the act of *Camp* in discharging the duties of a bricklayer, to whom is he liable? What does the law mean? Why, clearly, that he is liable to third parties for the injuries *Camp* may do to them, but not to *Camp* for the injuries he may do to himself. Under this principle of law, it must be contended that *Kirwan* is liable either for the act of *Camp* or that of *Depouilly*; but if *Camp* chooses to pull the tower down on his own head while *Kirwan* is away, why should *Kirwan* suffer for it in payment to *Camp*, when *Kirwan* knew nothing of what *Camp* was about, and himself suffers severely in the loss of his money, materials and contract?

*Wignore v. Jay*, see Boston Law Reporter for December, 1850, pp. 380, 393, 394: "A party who had contracted to erect a building, employed some bricklayers for the purpose, and it being his duty to provide the proper scaffolding, entrusted the care of this to his foreman. The foreman having used bad material in the construction of the scaffolding, it broke, and one of the bricklayers was killed: *Held*, that in the absence of proof, that the foreman was a person deficient in skill or improper to employ for that purpose, no action, under the 9 and 10 Vic., c. 93, was maintainable by the personal representative of the party killed against the common employer."

*Benjamin* and *Micou*, for the Church Wardens.

The court was equally divided in opinion.

EUSTIS, C. J. The plaintiff obtained a verdict against the defendants for the sum of twenty-five hundred dollars, damages for injury to his body and limbs, caused by the falling of the central tower of the cathedral of St. Louis, in New Orleans, on the 19th of January, 1850. On this verdict, judgment was rendered. An application for a new trial, was refused by the judge. We infer, from his reasons given for refusing the new trial, that he acted rather with a view to a final determination of the cause by this court, than from any strong convictions of the correctness of the verdict. The defendants have appealed. The amount allowed the plaintiff, has not been contested in this court, the argument being confined to the right of the plaintiff to recover any damages against either of the parties defendant. The amount of the injury received by the plaintiff, and the fact of the accident being assumed, the cause of action is thus stated for the plaintiff:

The plaintiff is a master mason and bricklayer, and was employed by *Kirwan*, who was the contractor, for the rebuilding of the cathedral, as his foreman brick-



layer; he was at work on the tower when it fell, and fell with it. It is alleged in the petition, that the plaintiff was employed by *Kirwan*, under his contract with the Church Wardens, and a clause in the contract is relied upon as fixing the responsibility on the corporation of the church. The clause provides, that the said *Kirwan* binds himself to execute, in a good and workmanlike manner, with the best materials to be provided and paid for by him, under the direction and superintendence of *Mr. J. N. Depouilly*, the architect appointed by the wardens; or, in his default, of any other person appointed, &c., all the works described in said contract. The petition charges, that the fall of the tower was the consequence of capital defects in the plan on which the rebuilding of the edifice was to be effected, and also the unskillfulness, neglect and imprudence of *Kirwan* in his work. The plaintiff was employed by the defendant, at the rate of sixty dollars a month, and when he came to the building, *Kirwan* pointed out to him, *Depouilly*, who was architect of the wardens, and designated him as the person under whose directions he was to act.

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The opinions of two witnesses, whose testimony was taken on the trial, concur in assigning for the fall of the tower, three principal causes: 1st, that the work was advanced too rapidly and in bad weather; 2d, that the new work had not been sufficiently anchored or secured with the old work; and, 3d, the removing of the centre from under the arch. The height of the tower when it fell, was seventy-eight feet; the span of the arch was sixteen feet. On the 16th of January, the centre or wooden frame upon which the arch had been turned, was removed by the orders of *Depouilly*, and on the 19th following, in the morning, the tower fell.

I do not think the evidence discloses any negligence or fault on behalf of the plaintiff, which contributed to the accident, and would, if established, defeat his action under the rule recognized in the cases of *Myers v. Perry*, 1 Ann. 372. *Carlisle v. Holten*, 3 Ann. 48, and *Murphy v. Diamond*, ib. 441.

The wood frame was removed from the arch fifty-one days after the arch was completed; and the removal was made by *Camp*, the plaintiff, by the positive order of *Depouilly*, who superintended the work, as the architect, according to the requisitions of the contract with *Kirwan*.

I think the evidence establishes clearly, that the removal of the wooden frame from the arch, was the immediate cause of the accident. But we think it equally clear, that the tower would not have fallen, had the arch been properly constructed, as to workmanship and materials, and the superincumbent weight been properly distributed according to the rules of art. The primary cause, we have no means of ascertaining, the evidence on that point being altogether unsatisfactory. We shall proceed to consider the liability of each of the parties defendant, under the state of fact which I think the evidence presents.

By his contract with the Church Wardens, *Kirwan's* work was to be executed in a good and workmanlike manner, with the best materials, under the direction and superintendence of *Depouilly*, the architect appointed by the wardens, or some other architect by them selected, and agreeably to the plans and drawings to be furnished by him, the said *Depouilly*, in accordance with the plans annexed to the contract. Accordingly, *Depouilly* used to visit the building two or three times a day; examined and inspected the work as it progressed; and on the 12th of January, four days before he directed the removal of the frame which supported the arch, he gave *Kirwan* an order for the payment of \$2500, being the tenth installment due according to the contract, which order was paid on that day. It appears, that *Depouilly's* superintendence was

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aided by a building committee, appointed by the wardens, according to the contract; and it was upon their written orders, as well as *Depouilly's*, that the several installments were paid.

In this connection, it is proper to remark, that so far as third persons are concerned, the work must be considered as having been delivered as paid for. Code 2732. I find nothing in the law or the facts of the case, which relieves the Church Wardens from the liability imposed by law on the owners of buildings which have fallen down. In regard to that liability, it is not material to scrutinize the evidence as to the original cause of the falling of the tower. Whether the cause was in the plan or in its execution, it fell, and caused the plaintiff damage; and it results from the evidence, that there was some defect in plan, work, or materials; no other cause for its falling, having been made out in the evidence or shown in the argument.

The general rule of law is, that a principal is liable to third persons for the torts, neglects and omissions of duty of his agent, in the course of his employment. The rule is founded upon public policy and convenience; for, were it otherwise, there would be no safety to third persons in dealings with him, through the medium of agents, and no protection against injuries caused by the careless and reckless selection of incompetent or worthless agents. Pothier on Obligations § 121, § 453. *Droit civil de Toullier*, book 2, tit. 8 § 284, vol. 11.

It is contended, on behalf of the Church Wardens, that the facts in evidence bring this case within an exception to the rule, which is, that the relation of principal and agent, master and servant, creates no contract, and, consequently, no duty, on the part of the principal, that the agent or servant shall suffer no injury from the negligence of others employed by him in the same business or service; and that in such cases the servant and agent takes upon himself the hazards of any such business or employment, and the case of *Hugh v. The Carrollton Railroad*, recently decided, but still under advisement, is referred to as recognizing this exception. The application of the rule was recognized in that case. The principle, or one of the principles upon which that case was decided was, that no party is entitled to reparation for an injury, to which he has contributed by his own fault or neglect; a rule which we have frequently enforced in cases of injury, from causes which are dangerous and affect the public safety. And, in the present case, if from the evidence, I thought the plaintiff was in that category, I should conclude that his action would fail on that ground. He was employed as foreman of the bricklayers, and I do not find that any fault or neglect on his part has been established, although my impressions on the argument of the case were otherwise. An examination of the testimony has satisfied me, that the finding of the jury ought to be undisturbed as to this part of the case. The decisions cited by counsel in support of this exception to the general rule, have gone to the extent contended for, and it may be considered as the established law in England. In the United States cases of its application, in dangerous works, are constantly occurring. There is no necessity in the present case, of determining to what extent these decisions would be recognized as authority, under our jurisprudence. The principal cases are *Priestly v. Fowler*, in the Exchequer, 3 Meeson and Welsby, 1. *Hutchinson v. York Railway Company*, Law Reporter of February last, vol. 3, No. 10, 587, and cases there reported: *Farewell v. Boston and Worcester Railway Company*, 4 Metcalf, 49. *Murray v. South Carolina Railway Company*, 1 McMullan, 385. *Winterboltan v. Wright*, 10 Meeson and Welsby, 109. *Strange v. McCormick*, Law Reporter for April 1851, decided in the district court of Alleghany county, Pennsylvania. *Daniels v. Mann*, 10 Meeson and Welsby, 546.

The Court of Cassation, in 1841, recognizes no such exception to the general rule, of the responsibility for the acts of servants in the business of their employment, and held, that no such exception existed under the Code Napoleon. *Reygasse v. Plazen*, Dalloz R. 1841, 1st part, 271.

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The case is one of the falling of the wall of an unfinished edifice, in the centre of a populous city, and on the line of one of the principal streets. The protection of the public against accidents of this kind, has been specially provided for by the former and present laws of Louisiana.

The Roman law, which guarded with so much care, the safety of the citizen and the protection of his property and person, gave the right to the neighbor of a building, which threatened to fall, to demand security from the owner or possessor against the impending damage, *cautio damni infecti*. If the security was not furnished, the prætor was authorized to put the complainant in possession of the building. Law 40, *f. de damno infecto*, 39, 2. The laws of Spain and of France have ample provisions on this subject. Partida 3, tit. 32, laws 10, 11. Domat lib. 2, tit. 8, § 3. Toullier vol. 11, 317. Our code gives the neighbor a right of action against the proprietor, to compel him to demolish or prop up a building which threatens to fall. Art. 667.

The art. 666 provides, that every one is bound to keep his buildings in repair, so that they neither fall, nor any part of the materials, composing them, may injure the neighbors or passengers, under the penalty of all losses which may result from the neglect of the proprietor in that respect.

The owner of the building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair, or when it is the result of a vice in its original construction. Art. 2302. The damage caused, is not always estimated at the exact value of the thing destroyed or injured; it may be reduced according to circumstances, if the owner of the thing has exposed it imprudently.

That these provisions are entirely independent of the general rules concerning the responsibilities of master and employers, and not in any manner connected with their relations, is shown conclusively by their place in the code. These articles are in the same chapter, and follow immediately that which provides for the latter, which is numbered 2299. They are evidently founded in an enlightened view of public necessity. They protect the neighbor; the passenger in the street; and it would be singular, indeed, if the men at work at the building were excluded from their just and salutary operation.

It seems to me obviously to follow, that the undertaker, who puts up to the danger of the public a building defective in plan, materials, or work, is equally liable, in principle, with the owner, for damage occasioned by its falling down. Indeed, a stronger moral responsibility exists on his part. The owner is rendered liable from the policy of the law alone. He rarely knows any thing about the security of the work, either resulting from the plan or its execution. On the other hand, in the eye of conscience, the undertaker is the responsible man.

I do not find any legal reason, which can exempt *Kirwan* from his responsibility with his co-defendants. It is said, that the frame was removed by the order of *Depouilly*, during the absence of *Kirwan* from the building. This fact is not proved, and if it had been, would not have altered the case. The fall of the tower did not take place until the third day after the removal of the frame, and from the testimony, and from the duties of *Kirwan*, the jury were

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authorized in acting on the knowledge and approval of *Kirwan*, of the removal directed by *Depouilly*, which was clearly within his powers of direction and superintendence conferred on him by the contract.

The undertaker is responsible for the deeds of the persons employed by him. Code 2739.

The judges of the court being equally divided in opinion in this case, the judgment of the district court is therefore affirmed, with costs.

SLIDELL, J. I consider the verdict of the jury as finding these facts : 1st That there was no negligence or fault on the part of *Camp*, contributing to the disaster by which he suffered. 2d. That there was fault on the part of *Kirwan*, which did contribute to it. 3d. That there was also fault on the part of the corporation, through its building committee, (composed of its own directors,) and its selected superintendent, which contributed to the disaster.

I think the evidence in the cause authorized this finding.

It does not seem to me to be the duty of a jury or court, to measure the comparative degrees of negligence and fault, on the part of the respective defendants, so far, at least, as the plaintiff is concerned.

I think that in an ordinary case, where a landholder makes a contract with an undertaker, (as he is termed in our code) to erect buildings on his land, and in the performance of the work, by the undertaker, an accident occurs to an individual, whether a passer by, or a person laboring at the work, the landholder, who has not resumed possession, and who has used reasonable diligence to select a discreet and competent undertaker, is not answerable to the person injured. It seems to me, that whatever responsibility there may be for such accident, is thrown upon the undertaker, by the article 2739 of our Civil Code. But the Church Wardens took their case out of the ordinary category, by retaining a continuous and active direction and control over the construction of the work. By reason of the exercise of this discretion and control, they, in my opinion, are answerable to *Camp* for the consequences of the defectiveness of the work, and especially for the premature removal of the frame work, in the absence of *Kirwan*, and without, at all events, his contemporaneous concurrence.

I concur with the chief justice, in the conclusion, that the judgment should be affirmed.

ROST, J. The plaintiff was employed by *J. P. Kirwan*, as master mason, in the reconstruction of the Church of St. Louis, which the said *Kirwan* had undertaken, under a contract, with co-defendants.

When the tower of the church had been raised to the height of seventy-eight feet, it fell suddenly. The plaintiff was at work upon it at the time, and fell with it. The injuries he received by the fall, are of a serious and permanent character.

This action is brought under art. 2299 of the code, which provides, that masters and employers are answerable for the damages occasioned by their servants and overseers, in the exercise of the functions in which they are employed ; and also, under art. 2302, which makes the owner of a building answerable for the damages caused by its fall, when that fall is the result of a defect in its original construction.

The defendants pleaded the general issue ; and the church wardens further averred, that the building was in possession of *Kirwan*, under a contract, at the time of the accident, and that they were not responsible for it.

There was judgment against both defendants, *in solido*, for \$2500, and they have appealed.

Before going into an examination of this case, it is necessary to premise that, so far as the two articles of the code relied on, apply to this case, the responsibility which they create against the master and house-owner, is of the same nature and degree. As a general rule, under these articles, the master and house-owner are alike responsible for slight neglect.

The policy of those provisions of law is not denied, and if the plaintiff was a stranger to the defendants, his right to recover would be undoubted. But, the facts being found in his favor, by the verdict of the jury, this case again presents the question so much discussed in the case of *Hubgh v. The New Orleans and Carrollton Railroad Company*, whether the rights of servants, against their master or employer, in such cases, are the same as those of strangers.

It is a singular fact, and one which, in my opinion, is not without weight against the pretensions of the plaintiff, that although the institution of master and servant is the most ancient of social institutions, and cases, such as this, must have occurred in every country from the beginning of time, they have not, until within a few years, formed the subject of judicial adjudication. This clearly shows, that whatever the law may be, the common sense of mankind is against the maintenance of such actions. Of late, however, many such actions have been brought in England and the United States, and we have been favored with one decision of the Court of Cassation on the same point. *Hutchinson v. The York, Newcastle and Berwick Railway Company*, 14 Jur. part 1, p. 837. *Wigmore v. Jay*, 14 Jur. part 1, pp. 837, 838, 841. *Priestly v. Fowler*, 3 M and W, p. 1.

The decision in France is directly adverse to those made in England and the United States. It places servants, in all cases, on the same footing as strangers, while the English and American courts hold, as we did in the case of *Hubgh*, that the master is not responsible when the servant, by whose fault the injury occurred, was a person of ordinary skill and care. Those countries being governed by different systems of jurisprudence, it might, at first sight, be supposed that the conflict in the decisions of their courts, arose from different legislation. But their disagreement is not to be explained in that way. The decisions made on both sides, show that the law, so far as it protects strangers, is the same under the two systems, and it will be conceded that in both, the contract of hire, of labor and services, is considered as arising from natural law, and subject to precisely the same rules. Story on Bailments, par. 454.

The civil and the common law being the same, there must be error on one side in the interpretation of it. In France, we find but one case which does not appear to have been fully argued. In England and in this country, the question has been viewed in all its bearings, and thoroughly examined in a series of uniform adjudications. Under those decisions, the exemption, from responsibility in the master, has not been limited to cases where the employment of the servant was of a dangerous kind. The greater or less danger, attending the particular employment could not be converted into a rule of law, and if it could, the present case would not come under it, as there are few employments more dangerous or more trying to the nerves, than the building of a high tower.

The English and American cases have been put upon the broad ground, that the servant undertakes, as between himself and his master, to run all the ordinary risks of the service, and that this includes the risk of accidental negligence, on the part of a fellow servant, while in the discharge of his duty.

It would be a great error to suppose this to be an arbitrary rule. It is deducible from elementary principles of law. There is no contract between the

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owner of the house and the neighbor or passenger, which can at all modify the fundamental rule, that every man is bound to use his own property, so as to cause no injury to others : and he is accordingly held responsible to them for slight neglect, in the use or care of it. The case is different, however with regard to servants and overseers. As to them, there is, either in fact or in legal intendment, a contract under which the owner receives labor or services, and the servant their value. They are both under obligation, no doubt, to execute the contract in good faith. But it is a contract of mutual benefit, in which ordinary diligence only is required from either. Pothier, *Traité du dépôt*, No 23. Story on Bailments, par. 429.

The plaintiff having been employed as master mason, by the contractor *Kirwan*, stands towards the other defendants as if he had been employed by themselves. They were bound only to use ordinary diligence in the selection of their architect and their builder, and as the men selected had been long engaged in these pursuits, and had the reputation of being persons every way competent to the task, I am of opinion, that due diligence was used, and that this action cannot be maintained against them.

If it should be true, in fact, that the architect and builder were unskillful or habitually negligent, the plaintiff, who was working with them, and under them, had a much better opportunity of discovering their deficiencies, than the religious corporation whom he sues. After agreeing to do the work of one of them, according to the directions of the other, he could hardly be permitted to allege their habitual negligence or total want of skill. The injury which he has suffered would, in that case, have been the result of his own imprudence.

I believe that the architect and builder were such, as a prudent father of a family would have been justified in employing. This is sufficient to exempt the corporation from liability.

The claim against *Kirwan*, is equally unfounded ; no want of ordinary skill or prudence on his part has been shown. The plaintiff agreed to work exclusively by the directions of *Depouilly*. He was working under those directions when the work fell, and he sustained the injury for which he claims reparation. If the plan which *Depouilly* gave, or the manner in which he caused the work to be done, were defective, *Kirwan* did not assume towards the plaintiff the risks arising from those defects. He is protected against them by the directions he gave the plaintiff, and by the fact, that *Depouilly* was reputed a skillful architect. If, on the other hand, the manner of doing the work under the direction of *Depouilly* was defective, the plaintiff so far from having an action against the defendants, is responsible to them for the loss they have sustained.

The distinction established by the English courts, between the responsibility of the master to servants and to strangers, is clearly established by article 666 C. C., which being in *pari materia*, cannot be considered otherwise than as limiting the application of article 2302, to neighbors and strangers, and leaving the responsibility of the master to his servant, to the operation of the contract between them and the laws applicable to that contract. It is in consequence of overlooking this express limitation, that the Court of Cassation, in the case cited, held the master answerable to his servant, for slight neglect, in violation of elementary principles.

I adhere, therefore, to the principle deduced alike from the decisions of the English and American courts, and from the rules to which the contract of letting and hiring labor and services, is subject under our law, that a master is not

responsible to his servant for an injury sustained by such servant in consequence of the negligence of a fellow servant, provided the servant injured was at the time acting in his master's service, and the servant causing the injury was a person of ordinary skill and care.

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PARSTON, J. I concur in the opinion delivered by MR. JUSTICE ROST in this case.

*Benjamin and Micou*, for a re-hearing. The questions of law presented by the case are the following:

1. Is an owner of property liable for an accident happening to a third person, by the fall of a building, which is in the hands of a contractor, by the job or plot, before the delivery of the building to the owner?

2. If responsible to third persons, is there or not an exception to this responsibility with regard to the workmen employed on the building.

I. On the first question it is to be observed that, according to all the authorities, the responsibility of one person for the *quasi delicts* of another is exceptional; that it is to be confined strictly to the special cases enumerated in the law, and is not to be extended by construction. This view of the subject is supported by the plainest dictates of justice, for in the absence of a contract, it is only in case of fault that one man can be morally bound to pay money to another.

The general principle is laid down in the clearest terms in our code, in the art. 2294: "Every act whatever of man that causes damage to another, obliges him by whose fault it happened, to repair it."

Then comes the exception to the rule, which confines the responsibility to the author of the injury done.

Art. 2296. "We are responsible not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody." Plain, definite, and not to be misunderstood. "Persons for whom we are answerable," and things which we have in our custody." Was our contractor a "person for whom we were responsible?" Was the cathedral "a thing in our custody?" The art. 2296, however, contains this additional clause, in speaking of the responsibility of one man for the acts of another: "This, however, is to be understood with the following modifications." Here follows a series of articles describing the modifications: 2297 contains those resulting from the duties of father and mother, tutors and curators of minors; 2298, those of curators of the insane; 2299, those of masters and employers; 2300, those of owners of slaves; 2301, those of owners of animals; 2302, those of owners of buildings.

Now, it is perfectly apparent from this collocation of these seven consecutive articles, that the last six are, in the language of the lawgiver, "the modifications" of the first; that they form one whole to be taken together, and that in determining the meaning of the six separate species enumerated, we must look to the genus which comprises them all. It is, therefore, a sound conclusion that these several responsibilities result, because, as is stated in art. 2296, they arise in cases where the parties charged are either "answerable for others," or are "in custody of the thing." 2297-8 and 9, are cases of "persons answerable for others," 2300-1 and 2, are cases "of persons having custody of things."

Now, the article 2302, under which it is said we are liable, provides, "that the owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction." But the ground of this responsibility is found in the previous general art. 2296. It is because the owner "is in custody" of the building. If, however, he is not, if the custody has not yet been given up to him, if the building, as in the present case, was at the risk of the contractor, as provided in art. 2729, then the reason for the responsibility does not exist, and the maxim applies *cessante ratione, cessat etiam lex*.

It was on this view of the law that we based our plea denying the legal responsibility, under the averment that we had delivered up possession to the contractor, and that the building "was not in our possession nor under our control;" and, indeed, the opinion of his honor the chief justice appears to admit, that this construction of the law is sound, and that, until delivery to us, the responsibility on our part could not arise. The opinion contains this passage :-

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"In this connection it is proper to remark, that so far as third persons are concerned, the work must be considered as having been delivered as paid for. Code 2732."

We believe this to be the first time such a construction has been given to this art. of the code, and feel satisfied, that a more rigorous examination will convince the court, that neither the letter nor the spirit of the art. will admit of this interpretation. The stipulation of the contract, as to payments, is, that the contractor is to receive for the whole \$77,000, "payable in manner following, to wit: thirty thousand dollars during the progression of the work, at the rate of twenty-five hundred dollars per month, on the certificate of the architect, stating that the work done warrants the said payment; and the balance of \$47,000 at two, three, four, five, six, seven and eight years, from the date of delivery and acceptance of the work, in bonds, &c."

Now, let us compare with this stipulation the language of art. 2732: "If work be composed of detached pieces, or made at the rate of so much a measure, it may be delivered separately, and that delivery shall be presumed to have taken place, if the proprietor has paid to the undertaker the price due for the parts of the work which have already been completed."

Surely no argument is necessary to prove, that the cathedral is not a work composed of detached pieces, and as little is required to establish that, when a gross price is agreed to be paid for an entire work, this work is not "made at the rate of so much a measure." Our contract is clearly that which is defined by law as one *per aversionem*.

The language of the court is, that this delivery has taken place "so far as third persons are concerned." As the law makes no distinction of the kind here suggested, and as there is nothing, in the evidence, to give rise to any idea that third persons have been deceived by any apparent delivery, we submit, that it is unnecessary to examine whether cases might not possibly arise, authorizing a distinction between a delivery *quoad* the parties, and one *quoad* third persons, and that it suffices to say that, there is nothing peculiar in the mode of payment or the manner of making it, as provided by the present contract. The payment of part of the price, as a building progresses, and the balance on delivery, is not only the common but the universal usage of the country, and we doubt if a single contract for building can be found in the State, which does not contain a stipulation similar to that inserted in our agreement.

The French Code, art. 1791, is the same as the art. 2732 of our Code. When the French Code was submitted for discussion, the Court Royal of Toulouse gave it the same construction, as is given in the opinion of the chief justice in this case, and therefore objected to the article as being unjust towards the owner. Troplong explains the error of that court. If its construction of the article had been correct, the article would have been rejected; but it was retained in the French Code, because that construction was erroneous. Troplong says: "La cour de Toulouse ne faisait pas attention à un point important dans l'article 1791. C'est qu'il n'est pas du tout dans sa pensée de considérer comme une présomption de vérification, des à comptes donnés avant le commencement des travaux, ou même des à comptes payés dans le courant du travail, mais sans imputation sur telle ou telle partie; l'article 1791 a pris soin d'expliquer sa portée par ces mots très significatifs: si le maître payé l'ouvrier en proportion de l'ouvrage fait, ce qui veut dire que le payment n'élève une fin de non-recevoir contre les plaintes du maître, qu'autant que l'à-compte a été donné avec la volonté de l'affecter à telle ou telle portion de l'ouvrage déjà terminé. Autant il est raisonnable entendu en ce sens, autant il serait absurde. si on lui donnait la signification que la cour de Toulouse apercevait en lui. Troplong, Echange et Louage, vol. 3, No. 990."

It may not be improper in this connection to remark, that the whole chapter, which Troplong devotes to this interesting subject, from No. 959 to 1030, show the French law to be in entire harmony with that of England and the United States, and we respectfully refer to it to establish also the additional principle, that where the work falls to ruin during its progress, the presumption of law is, that it is the fault of the builder, and that the whole burthen of proof is thrown on him with such severity, that it is not sufficient for him to show that "*force majeure*" caused the damage; he must also show, that his fault did not contribute to it. See specially the paragraphs Nos. 987-8 and 9, 995, &c.

We have thus far examined the subject only in reference to those dispositions of the law, which render the owner of a thing responsible for the injury



caused by that thing whilst in his custody. Let us now regard it in another aspect, that of the person responsible for damages occasioned by the fault of those "for whom he is answerable." The only article in the code applicable by possibility to the present case, is the 2299th: "Masters and employers are answerable for the damage occasioned by their servants and overseers, (*leurs domestiques; et préposés*), in the exercise of the functions in which they are employed; teachers and artisans, for the damage caused by their scholars and apprentices, while under their superintendence.

"In the above case, responsibility only attaches when the masters or employers, teachers and artisans, might have prevented the act which caused the damage, and have not done it."

Let us for the sake of argument grant, that *Depouilly* was our overseer, (*préposé*), that the fall of the wall occurred by his fault, that it is logical to say, that the cause of the fall was not the defect of the work, but the taking out of the centre, and that the plaintiff was injured by the fault of *Depouilly*; we still assert, with entire conviction of the truth, the position that the wardens are not responsible under the law.

It is a curious and instructive fact, that the authors of our code have reversed the rule of the French law, in taking this article from the Napoléon Code. The French lawgiver, acting upon the principle, that the responsibility for faults of others was exceptional, limited by art. 1384, the liability of fathers and mothers to the cases where they might have prevented the damage, and have not done so. But it left the responsibility of masters and employers unlimited. Our code reverses this disposition. It limits the responsibility of the master and employer, and leaves that of the parent unlimited. The French law on this point follows the doctrine of Pothier. Treatise on Obligations, No. 121.

Now we aver, that even under the French law, with the unlimited responsibility of the employer, the plaintiff, in this case, would fail in his action.

In the case of *Platel v. Pichon and Omaere*, Sirey 42, 2, 49, the Court Royal of Douai, held in the case of a workman employed on a roof, who had caused damage by letting a piece of wood fall on a person in the street, that the art. 1384, which made employers liable for the acts of their overseers or *préposés*, is not applicable to the case of work confided to a person of a known and definite profession or calling, foreign to the knowledge and personal habits of the owner. That it is only applicable to cases where the workman or overseer, is supposed to be placed as a substitute to replace the owner; and the distinction is a clear and reasonable one. If I employ a man to see to the removal of my furniture out of my house; he replaces me as a substitute. I could do this myself, but choose to put another in my place, and I respond for him. But if I employ an architect, who is a professional man, to superintend a building, the case is no longer the same; I am unable to do it myself from want of knowledge of the art of a builder. He is not doing for me as a substitute, what I could do for myself, but he is hiring to me his professional skill, in the same manner as the builder hires his. Such was the opinion of the Court of Cassation, which says, that if the doctrine of the plaintiff were admissible, there is not a case in which a man employing a workman could escape responsibility, and that such a construction is inadmissible, because a law which imposes on one man liability for the act of another, is an exceptional law, to be restrained instead of extended.

II. The second question which we proposed to discuss was this, whether the owner of the property, even admitting his responsibility to third persons, could be liable to one workman or servant for the *quasi-délit* of another workman or servant, employed in a common work or service.

The opinion of the Chief Justice on this point, concedes that the rule for which we contend, "may be considered as the established law in England." It goes on to say, "that in the United States cases of its application in dangerous works are constantly occurring. There is no necessity, in the present case, of determining to what extent these decisions would be recognized as authority under our jurisprudence."

As the rule of the English law is not conceded to exist to its full extent in the United States, we desire first to show that the limitation of that rule to "dangerous works," is without foundation in reason, and derives no countenance from authority. It is introducing a new, unsatisfactory and indefinite element in the solution of these questions already sufficiently embarrassing in their nature. If the rule is admitted in any case, it will be found on an investigation of the pri-

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ciples which support it, that the greater or less degree of danger does not at all affect the question. What is a dangerous work? The insuperable difficulty of defining such a limitation of the rule; the impossibility of applying it with certainty, except in extreme cases, would be sufficient reasons for refusing to adopt it in any jurisprudence.

In one of the cases from England cited by us, that of *Priestly v. Fowler*, 3 Meeson and Welsby, p. 1, where a servant of a butcher sued him for injury suffered by the breaking down of a van or cart, driven by a fellow servant, in which van the plaintiff was carrying the defendant's goods, by orders of the latter, Lord Abinger, the organ of the court, gave the reasons at length on which the defendant was exonerated. Not one of them is based on any technical doctrine of the English law, but on the nature of the contract between master and servant. He says, in the course of his judgment, that if the plaintiff's action could be maintained, the principle of liability would be carried to an alarming extent. He cites a number of supposed cases, and amongst them says, "that under such a rule, the master would be liable for the negligence of the builder, for a defect in the foundation of the house, whereby it fell and injured both master and servant by the ruins." He continues, "The inconvenience, not to say the absurdity of these consequences, affords a sufficient argument against the application of this principle."

It is a singular example of the diversity of human judgment, to find a rule upheld by a judge in Louisiana as a salutary rule of public policy, and denounced by another, in England, as inconvenient and almost absurd in its consequences. Both judges bring to bear on the question a large experience and profound knowledge of the law: both consider it without reference to authority, and reason on it as *res integra*, and their examination leads them to conclusions diametrically opposite to each other.

It is to be observed, however, that the judgment of the English Court was the unanimous opinion of the Exchequer Bench, and has been approved, commented on, and adopted by every State in the Union where the question has been discussed; not one case is cited to the contrary; and, we repeat, this has been done not with reference to any special legislation or technical rule peculiar to the common law, but on the eternal and all-pervading principles of natural reason and of justice.

In *Farrell v. Boston and Worcester Railroad Company*, 4 Metcalf, 55, Chief Justice Shaw delivered the unanimous opinion of the court, and begins by stating, that the question is of new impression, and involves a principle of great importance. The plaintiff was an engineer on a steam car of defendants; one of his fellow servants, in the employ of the company, turned the switch the wrong way, from negligence and carelessness, whereby the plaintiff was thrown off the car and injured. The case is stated by the court to be brought on the ground of *quasi delict*; it is admitted in the case, that the act done by the servant, in the course of his employment, is considered in contemplation of law, so far the act of the master, that the latter shall be answerable *civiliter*. But the court go on to say, on the question now under consideration: "But this pre-supposes that the parties stand to each other in the relation of strangers, between whom there is no privity; and the action in such case is an action sounding in tort. The maxim, *respondet superior*, is adopted in that case from general considerations of policy and security. But this does not apply to the case of the servant bringing his action against his own employer, to recover damages for an injury arising in the course of that employment, where all such risks and perils as the employer and the servant, respectively, intend to assume and bear, may be regulated by the express or implied contract between them, and which, in contemplation of law, must be presumed to be thus regulated."

We again quote from the decision, because in the opinion given in our case, the Chief Justice says that public policy is just the reverse, but the reasons are not given; whereas the Supreme Court of Massachusetts gives the following in support of its view:

"We are of opinion that these considerations," (i. e. of public policy,) "apply strongly to the case in question. Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as

the safety of the whole party may require. By these means, the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity, in case of loss by the negligence of each other."

In New York, the decision of the Supreme Court of Massachusetts is adopted to its fullest extent. *Brown v. Maxwell*, 6 Hill, 593. This was an accident, happening to a stone-cutter, by removing a stone from a pile so carelessly that another stone fell and broke the plaintiff's leg. The act was done by command of defendant's foreman, in the absence of defendant.

This was no case of a "dangerous work." In Pennsylvania, the same rule prevails as held in the case of *Strange v. McCormick*. Law Reporter for April, 1851. The court reviews the decisions, and places its own opinion on the ground that the action arises *ex contractu*, and not *ex delicto*. In South Carolina the law is the same. *Murray v. South Carolina Railway Company*, 1 McMullan, 385.

But the opinion of the Chief Justice in our case, cites the decision in *Reggasse v. Plazen*, Dalloz, 1841, 1, 271. This citation is certainly in point, to show that the distinction referred to was not recognized in this particular case. The case was an appeal from the Court Royal of Toulouse. The judgment of that court recognized the exception and discharged the defendant. It was the case of two servants, set to work by the master to trim a hedge, and one was wounded by the negligence of the other whilst they were at work together.

Now, although in this special case of a house servant (domestique) the Court of Cassation did refuse to recognize the distinction, yet in the case of fellow-workmen it was fully established in the same court. In the case of *Pit-tet v. Montague*, Sirey 1838, 2, 70, the Court Royal of Lyons in deciding against plaintiff, whose claim was based on the negligence and unskillfulness of a fellow-workmen in running certain machinery, say, "l'accident aurait été causé par la faute personnelle d'un préposé, vis-à-vis d'un autre préposé pour le même travail, et l'article 1384 n'est pas applicable à ce cas, parcequ'il y a de la part de celui qui consent à fournir, assistance salariée ou officieuse pour un travail quelconque, acceptation des chances de danger qu'il peut présenter, &c.

The Court of Cassation, in confirming this judgment, gave the following reasons:

"Que lorsque des ouvriers sont occupés ensemble au genre de travail qui leur est spécial, l'imprudence d'un d'eux peut bien ouvrir contre lui une action en responsabilité, mais ne saurait donner lieu à la garantie de l'ouvrier contre le propriétaire pour lequel ils ont travaillé: que les risques que peut présenter leur travail sont compensés vis-à-vis du propriétaire par salaire spécial de leur genre d'occupation."

Hence, we find two Courts Royal and the Court of Cassation combined against one stray decision of the latter court about household servants. But all the decisions in the French courts, recognize the exemption of the owner from liability for the negligence of one mechanic, or his want of skill, when causing damage to a fellow-laborer on the same work.

And the law of Louisiana, article 666, expressly limits the responsibility of the owner to cases of damage to "neighbors and passengers," resulting from the neglect of the proprietor to keep his building in repair.

CAMP  
V.  
THE WARDENS  
OF THE CHURCH  
OF ST. LOUIS.

#### A. AND J. DENISTOUN & CO. v. JAMES PAYNE.

A mortgage claim had been reduced to judgment in Mississippi, suit was afterwards brought upon the claim in Louisiana. The court held, that the claim was merged in the judgment, and that the action should have been on the latter and not the former.

The petition alleged indebtedness on a claim; a supplemental petition alleged, that the claim had been reduced to judgment, thus showing, that the ground of action in the original petition, was extinguished. The plaintiff could not so amend, for it changed the cause of action, and altered the substance of the demand.

DENISTOUR  
PAYNE.

**A**PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. E. Briggs*, for the plaintiffs. *J. L. Mathewson*, for defendant. By the court:

ROST, J. The judgment dismissing the plaintiffs' petition in this case, is in conformity with the settled jurisprudence of this court.

Their mortgage claim against the defendant, who is a resident of the State of Mississippi, had been merged in two judgments, rendered in their favor, against him in that State. As was held in case of *McKee et al. v. Cairnes*, 2 N. S. 604, those judgments had the same effect as if they had been rendered in Louisiana. The mortgage claim was merged in them, and no action can be maintained upon it.

The amendment contained in the supplemental petition, was the same which this court held to be inadmissible in the case of *Oakey v. Murphy*. 1 Ann. 372.

The allegation in the supplemental petition, that the plaintiffs have obtained judgments on their claim, shows their original ground of action to be extinguished, and we think now, as we did in *Oakey's* case, that an amendment entirely changing the cause of action, alters the substance of the demand, within the meaning of art. 419. C. P. This is a rule of practice, which, once settled, ought to be adhered to, unless manifestly wrong.

We doubt not, as stated by the plaintiffs' counsel, that the time for the service of the petition was short, and that he had not at hand the documents necessary to bring the action in another form. This is a misfortune against which we cannot relieve his clients. There are hard cases in the application of all rules of law.

Judgment affirmed, with costs.

### KEANE v. FISHER & Co.

The claim was for more than \$500, and proved by only one witness. The application of defendants to the court, to instruct the jury on certain questions of law, as set forth in the record, cannot be construed into an admission of fact by the defendants, and treated as a circumstance corroborating the testimony of the single witness.

The affidavit by which the plaintiff obtains the arrest of the defendants, will not be received as a circumstance corroborating the testimony of a single witness, in an action to recover of the defendants a claim of over \$500.

The defendants asked the charge of the court to the jury on many points, twelve of which implied a sale from the plaintiff to the defendants, and each therefore was a circumstance corroborating the positive testimony of the witness to the plaintiff's claim. Per *Preston, J.* dissenting.

**T**HIS case was tried by a jury before the Fifth District Court of New Orleans, *Buchanan, J. Race and Foster*, for plaintiff. *J. Ad. Rozier*, for defendants. By the court:

SLIDELL, J. I find only one witness to prove the claim, and I do not discover any corroborating circumstance established by any other testimony or evidence. I do not conceive that the application of the defendants to the court, to charge the jury on certain questions of law, as set forth in the record, can be construed into an admission of facts by the defendants, and so be treated as a circumstance corroborating the testimony of the single witness.

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v.  
FISHER.

I do not concur in the opinion of the district judge, that the oath of the plaintiff, annexed to the petition, by which he obtained the arrest of the defendants, can be treated as a corroborating circumstance; nor, in his opinion, that the plea of the defendants involves an admission of the purchase of the sugar.

In my opinion, therefore, the judgment should be reversed, and the case remanded for a new trial, the costs of the appeal to be paid by the plaintiff.

EUSTIS, C. J. and ROST, J. We concur in this opinion.

PRESTON, J. dissenting. The plaintiff brings this suit for the price of a quantity of sugar sold to the defendants. He alleges that it was a sale for cash; that the defendants had failed to pay any part of the price, and yet had disposed of the sugar, so that he was unable to make the price out of the sugar. For which reason, he prayed that the defendants might be arrested and punished under the 10th section of the act passed in 1840, to abolish imprisonment for debt.

The defendants filed a general denial as to the debt, and specially denied the fraud charged, alleged that the charge was slanderous, for which they reconvened for ten thousand dollars damages. The case having been tried by a jury, they found a verdict for the amount claimed by the plaintiff for the price of the sugar with interest, but could not agree as to the charge of fraud. A judgment was rendered against the defendants for the amount of the verdict, with interest and costs, and they have appealed.

It is contended that the claim was proved by only one witness without corroborating circumstances, and being for an amount exceeding five hundred dollars, the evidence was insufficient, and the judgment should be reversed. The district court, in overruling the defendants' application for a new trial on this ground, mentioned several circumstances corroborating the testimony of the witness. Without adverting to them, it may be stated that the defendants asked the charge of the court to the jury on many points, twelve of which implied a sale from the plaintiff to the defendants, and each, therefore, was a circumstance corroborating the positive testimony of the witness to the plaintiff's claim. It is immaterial, therefore, whether the court charged the jury correctly or incorrectly as to the effect of the reconventional demand, as the plaintiffs' claim is satisfactorily proved, and the judgment as to it should be affirmed.

A motion was made for a new trial, on the ground that the jury had not the right to pass upon the question of indebtedness without, at the same time, rendering a verdict upon the question of fraud, and on the reconventional claim for damages. The court, in overruling the application, gave the following reasons: "This cause has been submitted to two juries. The first jury was discharged after being out all night, having signified to the court, through their foreman, that they could not agree. But the subject of their disagreement could not have been the fact of the indebtedness of the defendants to the plaintiff as charged in the petition, because that fact was fully and repeatedly admitted by defendant's counsel in argument to the jury on that trial. On both trials, the court charged the jury that there were two questions to be decided by them, indebtedness and fraud, and that upon their decision on the question of fraud, depended still a third question, to wit, damages; when, therefore, it was intimated to the court by the foreman, in presence of the jury, at a late hour in the evening, after the jury had been several hours locked up, that the jury were agreed upon the question of indebtedness, but that it was impossible for them to agree upon the question of fraud and damages, the court consented to receive their verdict upon the first point, being of the opinion that it was not necessarily connected with the other questions, and the cause would thereby be simplified, for the action

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of a third jury, in case there should be a third trial. That verdict has met the justice of the case as far as it goes, and I am not disposed to disturb it.

These reasons are satisfactory. Every reasonable effort had been made to obtain a verdict, as to the charge of fraud and reconventional demand, by the same jury that passed upon the debt; and such efforts should be made in all similar cases. But I do not consider the issue, as to the debt, so inseparable from the other issues, that the claim of the creditor should be unreasonably delayed, because of the inability to obtain a decision upon the other issues.

I think the judgment of the district court ought to be affirmed, with costs.

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### WILLIAM HOPKINS et al. v. JOHN G. PRATT & Co.

A shipment made under a contract, that the proceeds should be applied to reimburse advances made on it by the consignee, and to pay certain named creditors of the consignor, creates a right in favor of the consignee and those creditors on the proceeds, superior to that of an attaching creditor.

Intervenors, who sustain their pretensions, will not be entitled to recover counsel fees, where the attaching creditor, who resisted their claim, was in good faith prosecuting what he deemed a legal right.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Wolfe and Singleton*, for plaintiffs. *E. Rawle*, for intervenors. By the court:

ROST, J. The evidence satisfied the district judge that *Buchanan, Harrington & Co.*, in consideration of the consignment to them of the cotton in controversy, by *Jacob Barkman*, in the State of Arkansas, where the firm is established, advanced to him the amount claimed by them, and assumed to pay out of the proceeds of the cotton, the sums claimed by the intervenors, *M. D. Cooper & Co.* and *Slark, Day, Stauffer & Co.*; and we have no reason to doubt the correctness of the conclusions to which he came.

The plaintiffs' counsel objected to the parol evidence offered to prove the contract between *Barkman* and *Buchanan, Harrington & Co.*, on the ground that it appeared by the testimony of one of the witnesses, that there was an agreement, in writing, in relation to it. The written evidence here alluded to, is a receipt signed by *Barkman* in the receipt book of *Buchanan, Harrington & Co.*

The witness, *Lafayette Buchanan*, has annexed to his answers an exhibit, showing the cash advances made and the amounts assumed by *Buchanan, Harrington & Co.*, and has stated in his testimony, that the receipt of *Barkman*, in the books of the firm, was for the cash advances made in pursuance to the verbal agreement. We do not understand the witness, *Hardy*, to state any thing more; his saying that the receipt corresponds with exhibit A annexed to *Lafayette Buchanan's* testimony, evidently means that it corresponds with it, so far as the cash advances are concerned. We are satisfied that there was no written contract, and that the evidence offered was the best that the nature of the case admitted of, and was, therefore, properly received.

The cotton was shipped to New Orleans, subject to that agreement, and the attachment levied upon it on its arrival here, cannot defeat the rights acquired by the intervenors. This case cannot be distinguished from that of *Oliver v.*

*Lake*, 3 Ann. 78. And under the authority of that case, the intervenors must be paid by preference, out of the proceeds of the cotton attached. We think there is error on that part of the judgment which allows them counsel fees. The plaintiffs sued out their attachment in the just exercise of their legal rights, and the judgment decrees to them the balance remaining, after satisfying the claims of the intervenors, of which they were probably ignorant. They acted in good faith and are not liable in damages. *Hill v. Noe*, 4 Ann. 304.

It is therefore decreed, that the judgment of the district court be amended, by striking therefrom the allowance of \$75 to *Buchanan, Harrington & Co.*; \$40 to *M. D. Cooper & Co.*; and \$25 to *Slark, Day, Stauffer & Co.*, as counsel fees; and that, in other respects, the judgment be affirmed: the costs of the appeal to be paid by the intervenors.

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v.  
PRATT.

### SLARK, DAY AND STAUFFER et. al. v. BROOM AND CAUGHLIN.

In ordinary cases, a captain signing a bill of lading, is considered as signing as the agent of the owners of the vessel, and being an act done within the scope of his authority as master, his contract is binding upon the owners. The contract, under the bill of lading, is, to transport the goods safely to the place of destination, and there deliver them to the consignees or their order. This duty must be performed, unless its performance be prevented by the happening of the excepted perils. If under the pressure of extreme necessity, a sale of the cargo becomes necessary, still the proceeds of sale, after deducting the contributive share for general average and other lawful charges, must be accounted for, to the owners of the goods, by the captain and owners of the vessel.

A bill of lading, by legal implication, announces the liability of the owner of the ship, and this liability cannot be excluded by an extrinsic fact, not communicated to the shipper. Where, therefore, the shipper received bills of lading in the usual form, in the absence of evidence to the contrary, he may justly be considered as looking to the usual responsibility, to wit, that of the captain, the ship and the ship-owner.

By the Court: "We think it clearly results, that it (the charter party) was a contract to carry, for a stipulated reward, all such goods up to the extent of the ship's capacity, as the charterer should furnish, and such passengers, up to a certain number, as he should furnish; but that the possession, command and navigation of the ship, remained in the owners, through the master and mariners appointed and paid by them; and that the responsibility for the safe delivery of the cargo, saving such losses as might arise from excepted perils, rested upon the master and the owners."

Where, therefore, the vessel was stranded, and the master sold the cargo, and appropriated a part of the proceeds for the maintenance of the passengers, and for their transportation, under what he regarded the authority of the passengers act of 12 and 13 Victoria, it was held, that the ship-owner was liable to the freighter.

Although the freighter may have a privilege on the vessel for a non-delivery of the cargo, he has no privilege on the insurance money due under a policy covering the vessel.

Where the privilege claimed is one resulting from the nature of the obligation, it pertains to the merits, and may be tried with them.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Hite and Gailher*, for plaintiffs.

*Benjamin and Micou*, for defendant. On the whole case, we conclude that the contract of affreightment of the plaintiffs, was made only with the charterers. To them they entrusted their goods, and of them only, they have the right to demand them. Between the plaintiffs and the owners, there is no contract and no privity, and consequently no action has accrued. *Agricultural Bank v. Barque Jane*, 19 L. R. 8.

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In this case the ship was lost, and the plaintiffs claimed a privilege upon her insurance money, and sequestered it in the hands of the insurers. Even if it were true, that the plaintiffs had by their shipment acquired a lien on the ship, that lien does not extend to the insurance money. It has been so expressly decided in *Thayer v. Goodale*, 4 L. R. 222.

By the court :

SLIDELL, J. The object of this suit, is to recover of the defendants, as owners of the ship *Cato*, the value of certain goods shipped on board that vessel at Liverpool, under bills of lading, in the usual form, signed by her captain, and which were not delivered at New Orleans, the port of destination.

The *Cato*, an American ship, belonging to the defendants, was chartered at Liverpool, by the captain, to *James Browne & Co.*, by a charter party, in these words :

"Memorandum for charter, Liverpool, 25th January, 1851: It is this day mutually agreed, between *Captain Robinson*, of the good ship or vessel called the *Cato*, of the burthen of 655 tons, or thereabouts, now at Liverpool, whereof is master, and *Messrs. James Browne & Co.*, of Liverpool, merchants and freighters of the other part, that the said ship, being tight, staunch and strong, and approved of by the surveyors appointed by the government, as being eligible to carry passengers, shall, with all convenient speed, be made ready, and receive and take on board a cargo of lawful merchandise, and such steerage passengers, as the charterers may procure, not exceeding the legal complement, 275; charterers to find provisions according to law, berths, water-casks, water, fuel and cooking grates, and pay the hospital and commutation money, at the port of delivery; the vessel not to be loaded deeper than seventeen and a half feet aft and seventeen feet forward, and to be dispatched at the expiration of fifteen days after she obtains a proper loading berth, and is ready to commence loading in Waterloo or Victoria Dock, or sooner, at the charterers option. In all, not exceeding what she can reasonably stow and carry, over and above her cabin, tackle, apparel, provisions and furniture; and being so loaded, shall therewith proceed to New Orleans, or so near thereunto as she may safely get, and deliver the same agreeably to bills of lading; and so end the voyage. (Restrains of princes and rulers, the dangers of the seas and navigation, fire, pirates and enemies, during the said voyage, always excepted.) The ship to be provided by the owners, with proper boats, ventilators, two life-buoys, houses over the hatchways and camboose, and a passenger's cook.

"And the said charterers do hereby promise and agree, to load the said vessel, with said cargo, at Liverpool, and to pay freight as follows: For the hire of the vessel, as above mentioned, the sum of eight hundred pounds. The freight and primage, as per bills of lading, to the extent of this amount, to be taken in payment at the port of delivery, at four dollars and eighty cents per pound; the deficiency, if any, to be paid in Liverpool, before sailing, in cash, deducting insurance on passage money. Demurrage, if detained by the charterers beyond the above time, to be paid at the rate of seven pounds, British sterling, per day; but the vessel not to be required to remain on demurrage longer than ten days; but if head winds prevail at the expiration of said laying days, preventing vessels of similar size and draft from sailing, then the vessel to continue taking cargo and passengers, to the extent herein named, without the charterers being liable to demurrage.

"The vessel is to be consigned to charterer's agents at New Orleans, allowing them two and a half per cent commission. Penalty for the non-performance of this agreement, £800. (Signed) J. W. ROBINSON and JAMES BROWNE & Co."



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The vessel received her cargo and passengers under this charter party, and proceeded on her voyage; but having met with a disaster at sea, by striking and being stranded, entered the port of Nassau in distress; and there, after survey, being pronounced incapable of proceeding, was abandoned, and the passengers and cargo landed. The cargo was then sold at Nassau, for the benefit of whom it might concern; and by the adjustment of the average made by an adjuster, under the direction of the defendants, it appears, that after the proper contribution for paying salvage, expenses, &c., there remained the sum of \$7780, which was received by the captain. Of this sum, about \$1000 was paid, by the captain, into the hands of the defendants at New Orleans; the balance of the sum, was expended by the captain for the maintenance of the steerage passengers at Nassau, and in conveying them, by other vessels, thence to New Orleans.

There is, in evidence, an act of parliament, 12 and 13 Victoria, entitled an act for regulating the carriage of passengers in merchant vessels. The 24th section enacts as follows: And be it enacted, that in case any "passenger ship" shall be wrecked or otherwise destroyed, or shall by any other cause whatever, be prevented from landing her passengers at the place they may have respectively contracted to land; or in case such ship shall put into any port or place in a damaged state, or shall not, within a reasonable time, according to the circumstances of each case, but not exceeding six weeks in any case, be ready to proceed with her passengers on her intended voyage, after having been first efficiently repaired, and in all respects, put into a sound and seaworthy condition; then, in any of such cases, such passengers respectively, shall be provided with a passage, by some other equally eligible vessel, to the port or place at which they respectively may have originally contracted to land; and in default thereof, such passengers respectively, or any emigration officer on their behalf, shall be entitled to recover, by summary process, as hereinafter mentioned, all monies which shall have been paid by or on account of such passengers, or any of them, for such passage, from the party to whom the same may have been paid, or from the owner, charterer, or master of such ship; and also, such further sum, not exceeding five pounds, in respect of each such passage, as shall in the opinion of the justices of the peace, who shall adjudicate on the complaint, be a reasonable compensation for any loss or inconvenience occasioned to any such passenger, or his or her family, by reason of the loss of such passage: provided, always, that no policy of assurance effected in respect of such passages, or of such passage and compensation monies, by any person hereby made liable in the events aforesaid, to provide such passages, or to pay such monies, shall be deemed to be invalid by reason of the nature of the risk, or interest sought to be covered by such policy of assurance.

There is also the testimony of two captains, who state, that they have made many voyages between New Orleans and Liverpool; and that they have made similar charter parties. They testified that, on such contracts, they retained possession, control, management, and navigation of the ship; that the expenses of the navigation were incurred by the owner, such as wages of captain, crew, port-charges, and victualling of the ship; that, in such contracts, the universal custom of Liverpool, as understood by the witnesses, among ship-owners, masters, and merchants, was, that the master of the ship should retain exclusive possession, control, and navigation of the ship, for the owners' account and benefit; and that the owners incur the expenses of navigation, and that the

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charterer has nothing to do with the navigation and control of the vessel after she proceeds to sea; that the manner in which the stipulated price of the ship is paid, is by taking the amounts of freight to the extent of the freight bills. If there be a deficiency, the charterers pay the deficiency; and, if there is a surplus, the charterers take that surplus, and that ends their relations with the charter. Under a contract of that kind, the captain and owners become responsible for the transportation of the goods. On cross-examination, by defendants, these witnesses testified that, under a charter party like this, the charterer makes the engagements for the freight; that they never had a case under a charter party like this, in which the question arose, whether such a loss would fall on the charterer or the owners.

The question presented for our decision, under the state of facts above presented is, whether the owners of the ship are liable to the shippers in a personal action for the money so received and expended by the captain. The district court gave judgment for the plaintiffs, and the defendants have appealed.

It is contended, for the defendants, that the act of Parliament imposed upon the captain the duty of selling the cargo, in order to accomplish the transportation of the passengers. But, we find no such duty imposed by the statute in the section above cited; nor does it seem to us to be reasonably inferrible from other portions of the law. If there was any power in the master to sell, it rested upon the general law.

We must look, then, to the charter party, the bills of lading, and the attendant circumstances, in order to arrive at a solution of the question.

If we look simply to the bills of lading, there can be no doubt that the defendants are liable. As we have stated, they are in the usual form, and signed by the captain. In ordinary cases, a captain so signing, is considered as signing as the agent of the owners of the vessel; and being an act done within the scope of his authority as master, his contract is binding upon the owners. The contract is, to transport the goods safely to the place of destination, and there deliver them to the consignees or their order. This duty must be performed, unless its performance be prevented by the happening of the excepted perils. And if, under the pressure of extreme necessity, a sale of the cargo becomes necessary, (and the present cause, under the meagre evidence before us, can be considered as exhibiting a case of such necessity,) still, the proceeds of sale, after deducting the contributory share for general average, and other lawful charges, must be accounted for to the owners of the goods, by the captain and owners of the vessel.

But, are the rights of the plaintiffs against the owners, under the bill of lading, affected by the fact of the charter party?

In the first place, it must be observed that no knowledge of the existence of the charter party is brought home to the shippers. If we infer that *Broune & Co.* personally sought out the shippers, and made the engagements for freight with them, *non constat*, that the shippers were informed whether they were acting as charterers or as consignees of the vessel. The shippers received bills of lading in the usual form, and in the absence of evidence to the contrary, may justly be considered as looking to the usual responsibility, to wit, that of the captain, the ship and the ship-owners. It seems unjust to deprive a party of the usual guarantees which attach to such a contract as he is making, unless there be something to warn him that other guarantees are to be substituted for them. The matter here, so far as the knowledge of the shipper is concerned, rests upon the bill of lading, which, by legal implication, announces the liability of the

owner of the ship; and yet the shipper is told that this liability is excluded, by an extrinsic fact not communicated to him.

Independently, however, of the absence of notice, what was the character of the charter party, and its legal consequences under the fair scope of the decided cases? For, in a matter of this grave commercial importance, authority is of great moment. If the present charter party is really controlled by a well settled current of authorities, both shipper and owner may well be considered as acting upon them, and are not to lose relief or escape liability by a recurrence to abstract principles, ingeniously deduced from the general law of contracts.

In *McIntyre v. Brown*, 1 Johns. 229, the court said: the true distinction was, that, where, by the terms of the charter, the ship-owner appoints the master and mariners, and retains the management and control of the vessel, the charter is rather to be considered as a covenant to carry goods; but, where the whole management is given over to the freighter, it is more properly a hiring the vessel for the voyage; and, in such case, the hirers would be deemed owners, *pro hoc vice*.

We believe this opinion of a very learned court, which was given many years ago, has ever since received a substantial concurrence in the United States. In *Marcadier v. Chesapeake Insurance Company*, 8 Cranch, 49, we find the Supreme Court of the United States following the same rule: "A person," says Mr. Justice Story, in that case, "may be owner for the voyage, who, by a contract with the general owner, hires the ship for the voyage, and has the exclusive command and navigation. Such is understood to have been the case of *Vallejo v. Wheeler*, Cowper, 143. But, when the general owner retains the possession, command, and navigation of the ship, and contracts to carry a cargo or freight for the voyage, the charter party is considered as a mere affreightment sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership. Such was the case of *Hoe & Co. v. Groverman*, in this court, 1 Cranch, 214. In the first case, the general freighter is responsible for the conduct of the masters and mariners during the voyage; in the latter case, the responsibility rests on the general owner. On examining the charter party in the present case, there can be no doubt, from the terms and stipulations, that it falls within the latter class of cases. The master, who was the general owner, retained the exclusive possession, command, and management of the vessel, and she was navigated at his expense during the voyage."

At a later day, that eminent commercial lawyer, Mr. Justice Washington, observed, in *Palmer v. Gracie*, 4 Washington, 122: "The general rule is, that where the owner employs, pays, and supports the master and crew, retains the control and navigation of the vessel, by means of the former, and is answerable for his conduct, a special ownership and possession do not pass to the charterer, although the ship is let and hired, and although the freight reserved be a gross sum." We refer to this case, as containing a learned and elaborate review of the decided cases in England and the United States.

Now, in applying these principles to the contract in question, which we are to interpret, not upon any single, isolated clause, but upon its entire language and provisions, we think it clearly results, that it was a contract to carry, for a stipulated reward, all such goods, up to the extent of the ship's capacity, as the charterer should furnish, and such passengers, up to a certain number, as he should furnish; but, that the possession, command, and navigation of the ship remained in the owners, through the masters and mariners appointed and paid by them; and that the responsibility for the safe delivery of the cargo, saving

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such losses as might arise from the excepted perils, rested upon the master and the owners.

It must be acknowledged, that there are some of the English cases which seem to militate against the conclusion to which we have come in this case. There is an apparent want of harmony in the decisions of the English courts, which, perhaps, is really attributable to the imperfect manner in which some of the cases are reported, leaving us in the dark as to the terms of the particular charter party. But, although the question in English jurisprudence seems to rest upon grounds somewhat uncertain and varying, we are inclined, on the whole, to believe, that this case would be decided there in favor of the plaintiffs.

In their petition, the plaintiffs allege that they had a privilege for their claim upon the ship *Cato*, and that the vessel having been lost, they have a privilege upon the amount of insurance effected upon her; they obtained a writ of sequestration, which was levied upon a sum of \$5000 in the hands of the Crescent Insurance Company. The district judge, in giving judgment in favor of the plaintiffs against the defendants personally, gave also a judgment of privilege upon the property sequestered. It would seem that the district judge supposed the vessel had been sequestered, for, in his written opinion containing the reasons for judgment, he speaks of the right of the plaintiffs to a judgment, "with privilege on the ship."

Although the plaintiffs might have had, for the non-delivery of the goods, a privilege upon the ship, had she arrived within our jurisdiction, we know of no provision of our laws which gives them a privilege upon the insurance money. That no such privilege can be claimed, was decided in an analogous case, *Thayer v. Goodale*, 4 L. R. 222; and in *Eymar v. Lawrence et al.*, 8 L. R. 42, it was held, that the privilege of the master for his wages does not extend to the insurance money, received by the owner's agent from the underwriters, upon the vessel which was destroyed by perils of the sea.

But it is said, that the defendants have lost the right of inquiring into that matter, because they did not take a rule to set aside the sequestration before an answer was filed, and the cause put at issue on its merits. A similar position was unsuccessfully assumed in the case last cited. It may be, that the defendants lost the right of questioning the regularity of the sequestration in point of form, by pleading to the merits without objection.

But the privilege claimed was a privilege resulting from the nature of the obligation; not, as in cases of attachment, a privilege resulting from the judicial proceedings. The question of the existence of a privilege seems, therefore, one pertaining to the merits, and to be determined with them. See also the remarks of the court, in *Eymar v. Lawrence*, upon art. 724, C. P.

The case of *Watson v. McAlister*, 7 M. R. 369, was a case of attachment. See also *Myers v. Perry*, 1 Ann. 373.

It is, therefore, decreed, that so much only of the decree of the district court, as adjudges a privilege on the property sequestered, be reversed, and said claim of privilege is hereby rejected. And it is further decreed, that said judgment, in other respects, be affirmed, the costs of the appeal to be paid by the plaintiff.

JAMES PENN, for the use of, &c. v. JOHN W. CROCKETT AND W.  
H. GARLAND.

The wife, upon a valid claim, obtained judgment against her husband, and also judgment for separation of property; he made a sale in payment of her rights, under the judgment, and the fairness of it was not impeached. The sale was held to be valid.

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**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. A. N. Ogden*, for plaintiffs. *Hamner and Hays*, for *W. H. Garland*.  
By the court:

ROST, J. The plaintiff, who is a judgment creditor of *W. H. Garland*, caused property, in possession of said *Garland*, to be seized under execution.

*Garland*, as tutor of his minor children, filed a third opposition, praying that the seizure be set aside and the sale of the property enjoined, on the ground, that it was the separate property of his wife, in her lifetime, and, at her death, descended to her children. The under-tutor has also made himself a party to the proceeding, for the purpose of representing the minors, so far as their interest may conflict with that of their father.

The plaintiff answered the third opposition, alleging the simulation of the title set up by the heirs of *Mrs. Garland*; and, further, that the property was purchased during marriage, with the means of *Garland*, in the name of his wife, to screen it from the pursuit of his creditors. That the wife having brought no dowry into marriage, could not sue for a separation of property, and the judgment, decreeing the dissolution of the community, was an absolute nullity. That even if *Mrs. Garland* had any claim against her husband, it was for a small amount, and she never had the means to purchase the property seized.

The district judge sustained the opposition, and the plaintiff has appealed.

In the case of *Davoc v. Darcy*, 6 R.R. 342, it was held, that the wife could, in certain cases, obtain a separation of property, although she had brought no dowry into marriage, and had no actual claims against her husband which could be endangered; and we have had occasion since, to affirm that principle, but the present case does not come within its operation, and is covered by the very letter of art. 2399 Civil Code.

*Mrs. Garland* had a claim against her husband, which the evidence shows to have been well founded, and this litigation is sufficient proof that it was endangered by the derangement of her husband's affairs. The judgment she obtained was for the amount of that claim.

We think that hers was a proper case for a separation of property, and as there is nothing to impeach the fairness of the sale, made by her husband to her, of his furniture, in payment of her rights under the judgment, that sale is valid and binding upon the plaintiff. See Civil Code, 2402.

The evidence adduced, to prove the origin of the means with which *Mrs. Garland* purchased the other property seized, is not satisfactory to a majority of the court, and if it should be true that the price paid for those purchases, was paid by the husband, the sales might well be considered as simulated. In deference to the opinion of the district judge, we will remand the case to be tried before a jury.

PENN  
v.  
CROCKETT.

In making this disposition of the case we will remark, that it is unnecessary to examine the question, whether *Mrs. Garland* was bound to contribute, after the separation of property, to the household expenses, and to those of the education of her children—because, admitting that she was, this would not give the plaintiff the right to seize her property, as he has done.

It is ordered, that the judgment so far as it sustains the third opposition of the heirs of *Mrs. Garland*, in relation to the movables transferred by *W. H. Garland* to her, in satisfaction of her judgment against him, be affirmed. It is further ordered, that the judgment be otherwise reversed, and the case remanded for trial before a jury. It is further ordered, that the costs of this appeal be paid by the third opponent and appellee.

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### DENEUFBOURG v. DIDION, ROMER et al.

Where mortgage property is sold at the instance of a creditor, a previous mortgage creditor is entitled to be paid, by preference, out of the proceeds, unless the seizing creditor prove that the defendant has other property of sufficient value, to satisfy the claim of the prior mortgagee.

**A**PPEAL from the Second District Court of New Orleans, *Lea, J. Robert Preaux*, for plaintiff. *Miles Taylor*, for *Caffin*. By the court:

**PRESTON, J.** This case differs from that of *Young v. Municipality No. One*, 5 Ann. 736, only in this, that in the former case the defendants had sufficient property to satisfy the claims of the opposing creditors, while, in the present case, the defendants are insolvent, and the property seized and sold under the plaintiff's mortgage, is the only asset out of which the previous judicial mortgages existing upon it can be satisfied. Under the dispositions of articles 301 and 403 of the Code of Practice, the court ordered the previous judicial mortgages to be paid out of the funds in the hands of the sheriff, and allowed the seizing creditor whatever surplus might remain.

The plaintiff prosecutes this appeal, but we are unable to perceive upon what ground he expects a reversal of the judgment.

It may be true that the note upon which he obtained judgment, was originally given as part payment of the price of the land sold by the sheriff; but the note bears date in 1840, and the rank of the vendor's privilege had been lost for want of reinscription within ten years, when the sheriff's sale took place on the 18th October, 1851.

Judgment affirmed, with costs.

### JAMES DAVERN v. MERCHANTS AND PLANTERS' INSURANCE COMPANY.

The insured who violates the conditions of his policy, cannot recover from the underwriters.

**A**PPEAL from the First District Court of New Orleans, *Larue, J. Lamb* and *Geo. Eustis, Jr.*, for plaintiff. *E. Rawle*, for defendant. By the court:

**EUSTIS, C. J.** The plaintiff had insurance against fire, on a building described in the policy as a two story, double tenement, frame house, and on the kitchen belonging thereto. After the insurance, a grocery was established in the house, in which articles denominated hazardous, in the memorandum of the policy, were sold. The building was destroyed by fire. According to the conditions of the policy, by this act on the part of the insured, the insurance terminated.

The district judge gave judgment for the defendants, and we concur in his opinion.

The judgment of the district court is therefore affirmed, with costs.

DAVERN  
v.  
MERCHANTS  
AND PLANTERS'  
INSURANCE CO.

### CATHERINE CORNELSON et al. v. SUN MUTUAL INSURANCE COMPANY et al.

A reward for the conviction of a person who may have been concerned in the commission of a crime, refers to a crime already committed, and not to one which may be committed subsequent to the offer.

A reward for the conviction of a person who may have been concerned in the perpetration of a specific crime, cannot be recovered, by the informant, for a conviction of a person of a crime less in degree and entirely different.

**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. P. S. Warfield*, for plaintiffs. *H. Gaither*, for defendants. By the court :\*

**ROST, J.** delivered the following opinion : On the 5th of April, 1849, the defendants offered a reward of \$3000 for the conviction of any free person, of mature age, who may have been concerned, either as principal or accessory, in setting fire to any building or buildings in the State of Louisiana.

On the 18th of November, 1850, *Henry McQuaird* was convicted, on the testimony of the plaintiffs, of having maliciously prepared combustible matters, and placed them under a building in this city, with intent to set fire to it. On the 21st February, 1850, by virtue of that conviction, the plaintiffs claim the reward offered by the defendants. There was judgment against them, and they appealed.

I incline to the opinion of the district judge, that the resolution of the defendants offered a reward for the conviction of persons who had committed the crime to which it alludes. The offer of a reward for the conviction of a crime to be committed, is unusual, and cannot, it seems to me, be inferred from the terms used. Besides, I cannot get over the objection, that the reward was offered for the conviction of a specific crime, and that *McQuaird* was prosecuted for, and convicted of, a crime less in degree and entirely different. I do not think we have the power to enlarge, by implication, the obligation of the defendants, to extend it to cases not named in the resolution.

I think the judgment ought to be affirmed. Judgment affirmed.

**EUSTIS, C. J.** concurred.

**PRESTON, J.**, dissenting. The defendants are a number of Insurance Companies, doing business in the city of New Orleans. They appear to have formed a voluntary association called, "The Board of Underwriters of New Orleans." On the 5th of April, 1849, they offered a reward, in the following terms, in two newspapers of this city :

\* *Slidell, J.*, was absent.

CORNELSON  
v.  
SUN MUTUAL  
INSURANCE CO.

"Whereas it is known to members of this board, that frequent cases of incendiarism have occurred in this city during the past month; and, whereas, if the incendiaries continue undiscovered, the most destructive consequences to property may be apprehended: Be it, therefore, resolved, that this board authorize its secretary to offer a reward of three thousand dollars for the conviction of any free person, of mature age, and two hundred dollars for the conviction of any slave who may have been concerned, either as principal or accessory, in setting fire to any building or buildings in the State of Louisiana."

The offer of this reward was not withdrawn until the 6th of June, 1850, in the following terms:

Office of Board of Underwriters: "One thousand dollars reward will be paid by this board, for the conviction (under proceedings instituted during the publication of this notice) of any free person, of mature age, and three hundred dollars for the conviction of any slave, who may have been concerned, either as principal or accessory, in setting fire to any building or buildings in this city or in Lafayette; all previous rewards are hereby canceled."

Between the offer, and its withdrawal, to wit, on the 22d of February, 1850, *Catherine Cornelson* denounced *Henry McQuaird and wife* to the Recorder of the Second Municipality of New Orleans, "for having, on the night before, attempted to burn a house, occupied by *Captain Hunt*, on Prytania street, within the city, by setting fire to shavings, with a view and intent to burn the same down."

They were indicted on the 11th of April, 1850, for having "maliciously prepared combustible matters, and put them under the building, on Prytania street, occupied by *Captain Hunt*, with intent to set fire to and burn the house."

*Mrs. McQuaird* was tried on the 31st of May, 1850, and acquitted.

*Henry McQuaird* was tried on the 18th of November, 1850, convicted and sentenced to imprisonment at hard labor in the penitentiary for ten years. He was convicted on the testimony of *Catherine Cornelson*, *Mary O'Kane*, and *Sarah Pritchard*. They sue for the reward of three thousand dollars.

The defendants contend, that by the terms of the reward offered by them, they intended to give it for the conviction of any person who had set fire to a building before it was offered. We cannot doubt but that the object of the offer of the reward, was to procure the conviction of any person who had or might, during the existence of the offer, commit arson, that others might be deterred from the commission of the crime, by the example. It states, that "frequent cases of incendiarism had occurred in the city the past month, and that if the incendiaries continued undiscovered, the most destructive consequences to property may be apprehended." The defendants, by their occupation, were greatly interested in the prevention of fires. On account of these facts, and the consequences apprehended, and the interest of the defendants, they offered the reward. What was the object? To prevent fires. What fires? So far as their interest was concerned, the moving cause of the offer, future fires. How were they to be prevented? By the conviction of the incendiaries. What incendiaries? Those guilty of the acts at any time before the conviction. Is the offer limited to offenders before the date of the offer of the reward? It does not say so; and the date of the offer is immaterial to the object of the offer, the conviction, in order to prevent fires.

The terms of the offer of the reward, make it for the conviction of a free person who may have been concerned in the setting fire to a building. These terms refer to the act done at any time before the conviction, and not to the



date of offering the reward. If the board had referred exclusively to the past, they would have said, "who have been concerned;" if exclusively to the future, "who shall hereafter be concerned;" but to embrace both present and future offences, they say, "who may be concerned;" and, we think, the grammatical sense, as well as the obvious intention of the defendants was, to offer the reward for a conviction without reference to the date of the crime, the date being immaterial to the object.

It is contended, that the reward was withdrawn on the 6th of June, 1850, before *McQuaird* was convicted. But he had been denounced by one of the plaintiffs, and indicted, no doubt, on the testimony of all, before the reward was withdrawn. These important steps having been taken, before the offer of a reward was withdrawn, entitles the plaintiffs to it, if the prosecution was successful. The legal measures necessary to a conviction, were well known to the defendants, when they offered the reward. Having been commenced, at the instance of the plaintiffs, they acquired an inchoate right to the reward, which the defendants could not afterwards defeat. All offers become contracts when accepted by such action as will accomplish the object. In this case, the plaintiffs had done all which could be required of them, to accomplish the object of the reward, except to attend passively, as witnesses, on the final trial of the accused. The reward, then, depended on the truth of their denunciation and the success of the prosecution; not the will of those who offered it.

It is lastly contended, that *McQuaird* was convicted of the crime of attempting to set fire to a house, and not of the offence, for the conviction of which, the defendants offered the reward, "being concerned in setting fire to a building." The preamble to the offer of the reward, shows that incendiarism, to use their expression, was the evil they undertook to arrest by the reward. The punishment of the attempt tended to that object, in the same manner as the punishment of the act, perhaps, as effectually, and with less evil to the defendants. There could be no motive of interest for offering a reward for the one offence, which does not apply to the other. They do not differ in the degree of danger which they caused to underwriters.

They are offences of the same nature, of the same tendency, and, so near in degree of guilt and of evil to insurers, that I think the defendants must have intended, in offering a reward to prevent arson, to offer it for each species of the crime, and that the plaintiffs and others might reasonably so interpret it.

### ROBERT B. WOODWORTH v. HIS CREDITORS.

Where the insolvent institutes proceedings for a voluntary surrender, and his creditors fail to attend the meeting, it is his duty to apply to the court, at once, to appoint the sheriff syndic. The ten days within which actions of fraud may be brought against him, are to be counted from the day of the appointment of the sheriff.

**A** PPEAL from the Third District Court of New Orleans, *Kennedy, J.* *Durant* and *Horner*, for plaintiff. *T. Wharton Collens*, for defendants.

By the court:\*

*Rost, J.* On the 3d of November, 1849, the plaintiff instituted proceedings for a *cessio bonorum*. The court ordered a meeting of his creditors, to take

\* *Slidell, J.*, absent.

**WOODWORTH** place on the 15th of that month, to deliberate on his affairs and appoint a syndic.  
**HIS CREDITORS** v. None of the creditors appeared before the notary, who certified that fact to the court on the 20th of November.

No action was had by the court upon that certificate, and things remained in that situation until the 3d of March, 1852, when *Duncan N. Hennen*, one of the creditors, appealed to the court, by petition, stating these facts, and praying that the sheriff might be authorized to receive the property surrendered, and appointed to perform the functions of syndic. The appointment was made, and within the ten days which followed, three of the creditors filed their petition, charging the insolvent with having fraudulently concealed his property at the time of the surrender, and praying for his arrest, on the ground that they had strong reasons to believe and fear that he was about to avail himself of the stay of proceedings ordered, to keep his person and property from his creditors. Upon affidavit of these and other facts, and of the grounds of their belief, the order of arrest was issued and executed, and the insolvent gave bonds. His counsel then moved to set aside the order of arrest, on various grounds. The insolvent has appealed from the judgment discharging the rule.

It is urged in behalf of the appellant, that the accusation of fraud came too late, more than ten days having expired after the day appointed for the meeting of the creditors, when the petition was filed; and the case of *Caldwell v. Bloomfield*, 2 L. R. 503, is relied on in support of that position.

The two cases are not identical. *Bloomfield* was in actual custody. Upon the certificate of the notary, that none of his creditors had attended the meeting, the judge had appointed the sheriff syndic to receive the surrender, and several months had elapsed after that appointment, when the insolvent went out of the prison limits. As no opposition had been made by any creditor, within the ten days which followed the appointment of the sheriff as syndic, the insolvent was protected by the 27th section of the Act of 1817, and it is clear that there had been no breach of the prison limits.

*Woodworth* was not in actual custody, but had instituted proceedings for a voluntary surrender. When he found that none of his creditors had attended the meeting, it was his duty to have applied to the court, at once, to appoint the sheriff syndic, so that he might surrender to him the property ceded. Instead of this, he retained the property and never moved in the matter. While things were thus kept by him in that incomplete state, there was no legal surrender, and the ten days within which actions of fraud may be brought against insolvents, had not begun to run. Under the express provision of the 27th section of the Act of 1817, the ten days were to be counted from the day of the appointment of the sheriff as syndic, on the application of *Mr. Hennen*; and, as this proceeding was instituted within the ten days which followed that appointment, the ground that the opposition came too late cannot be sustained.

The affidavit for the arrest contains all the requisites necessary, under article 223 of the Code of Practice. The district judge was of opinion that the truth of it had not been successfully impeached, and a careful perusal of the evidence has not brought us to a different conclusion.

Judgment affirmed, with costs.

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## JOHN BROWN v. CHARLES SCHMIDT.

The purchaser of property who, without authority, pays the price into the hands of the notary, incurs the risk of the deposit; and where the notary embezzled the money, it was held to be the purchaser's loss.

**A**PPEAL from the Second District Court of New Orleans, *Lea, J. Brewer* and *Purvis*, for plaintiff. *P. A. Ducros* and *Michael Hahn*, for defendant. By the court:

ROST, J. This case only differs from that of *Breen* against the same defendant, 6 Ann. 13, in this, that it is not shown, as in that case, that the defendant had authorized the plaintiff to deposit, with the unfaithful notary, the cash portion of the price. *Schmidt* had other monies in the hands of the notary at the time, and it is not proved that when he applied to him for part of it, he demanded the identical money deposited by the plaintiff. The evidence, as it is written in the record, certainly raised a presumption of assent on his part, but it was not enough for the defendant to render the fact probable, he should have made it certain. The notary having absconded, without accounting for the amount deposited, we are of opinion that the plaintiff must bear the loss.

It is proved that the defendant cannot, even now, give the plaintiff a clear title, and of course he had no right to claim the purchase money. His demand, in reconvention, was therefore properly dismissed. The appellant has asked, in his brief, a resolution of the sale, and we would decree it in his favor, if the prayer of his petition was not inconsistent with that form of relief. As the case is placed before us, the judgment can only be affirmed.

Judgment affirmed, with costs.

## AIMEE BRUSLE, Wife of Edward Gottschalk, v. M. THOMAS.

It is not necessary for the assignee of a claim to affix her signature to the act of assignment and subrogation; the institution of a suit upon the act is a sufficient acceptance of it.

**A**PPEAL from the Third District Court of New Orleans, *Kennedy, J. Train* and *Goold*, for plaintiff. *Bermudez*, for defendant. By the court:

ROST, J. This is a suit by the assignee of *Chatau*, a house builder, for the balance due on a house, built by him, for the defendant.

The defence is, that the building was erected by contract, and that the price agreed upon has been more than paid. The district judge was not satisfied with the evidence adduced to prove the contract, and gave judgment in favor of the plaintiff on the *quantum meruit*. The defendant has appealed.

If, as alleged by the counsel for the appellant, there was a contract in writing, which *Chatau* obtained from the defendant, and afterwards fraudulently refused to return, this should have been alleged and proved, and *Chatau* might then have been compelled to produce it; but, on the pleadings and evidence, the district judge correctly held, that no building contract had been proved.

## SUPREME COURT OF LOUISIANA,

It is objected by the appellant, that the plaintiff is not properly subrogated to the rights of *Chatau*, because the act of subrogation was not signed by her; her signature was not necessary to the validity of the act, and the institution of this suit is a sufficient acceptance of it.

Much of the evidence adduced to prove the value of the building, consists of the probable estimates of witnesses who had no means of knowledge, and is of no value. *Pierre Bouquet*, however, an old and experienced builder, states that he has examined the property in all its details, and has made estimates, the result of which is, that the value of the entire building, as it stands, is from \$4000 to \$4500. He also derives his knowledge from having put up similar buildings. It does not appear that the witness was cross-examined, by the defendant, in relation to his estimates. His testimony stands unimpeached; there is nothing to show that better evidence could have been procured by the plaintiff. Under that state of facts, the district judge assumed the value of the building to be \$4010, and gave judgment for the balance due on that valuation. We are unable to say that he erred.

Judgment affirmed, with costs.

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 GILLESPIE v FREEMAN et al.

Police juries have the power to lay out and construct roads and to erect bridges, or establish ferries over all water-courses and lakes, whether navigable or not.

The act of 12th March, 1818, to provide further and more effectually for the police of public roads, was repealed so far as it applied to the Parish of Concordia, by the act of the 7th February, 1829. By that act, plenary and unlimited powers were given to the Police Jury of the Parish of Concordia, to make such enactments with regard to roads and levees as it deemed necessary and proper. Under the act of 1818, it was necessary to make compensation to the owner for the land taken for a public road. The act of 1829, in this respect, repealed that act, so far as it applied to the Parish of Concordia. And until the late Constitution, it was competent for the Police Jury of that Parish to take land for roads, without making compensation to the owners.

The laying out of a road, and the establishment of a ferry, are acts of sovereignty which do nobody harm. No warranty or obligation to indemnify ever arises from them, without an express stipulation to that effect.

**A**PPEAL from the District Court of the Parish of Concordia, *Farrar, J. Thomas and Snyder*, for plaintiff. By the court:

ROST, J. The plaintiffs purchased from Congress a body of land, through which Cross Lake or Cross Bayou, a stream not navigable, passes. The land was surveyed and sold in square sections, without any exception or reservation as to the portion covered with water.

On the 19th of November, 1845, the Police Jury of the parish of Concordia, where the land is situated, passed an ordinance establishing a public ferry over the stream, on the land so purchased by the plaintiff, and fixing the rates of toll. This ferry was subsequently adjudicated to the defendant, *Freeman*, at public auction.

The plaintiff obtained an injunction against *Freeman*, on the ground that police juries have no right to establish ferries over streams not navigable; and that, if they have, they must previously make a compensation to the owner of the land over which the ferry is established.

The defendant called in warranty the Police Jury, who answered, and averred it their right to establish the ferry complained of. There was judgment in their favor, and the plaintiff appealed.

GILLESPIE  
v.  
FREEMAN.

There is no doubt of the power of police juries to lay out and construct roads, and to erect bridges or establish ferries on the them, over all water courses and lakes, whether navigable or not. A road leading to this ferry was laid out and opened by the Police Jury, in 1837. It is contended, that it was not established in conformity with the provisions of the act to provide further and more effectually for the police of public roads in this State, approved March 12th, 1818. But, as the 52d section of the act relative to roads and levees, approved February 7th, 1829, gives to the Police Jury of the parish of Concordia, plenary and unlimited powers to make such enactments, with regard to roads and levees, as they may deem necessary and proper, the manner of proceeding, presented by the act of 1818, was not binding upon them at the time of the laying out of the road.

The second ground of injunction would have been well taken, if the ordinance, establishing the ferry, had been passed after the promulgation of the new Constitution. As it is, the principles settled by the late Supreme Court, in *Renthrop et al. v. Bourgangs*, 4 M. R. 97, appear to us applicable to this case. The court there stated, that, during the existence of the French and Spanish governments, there was no instance of any payment for land taken for public roads; and appear to have inferred, from their uniform practice, that, as those governments granted their lands gratuitously, and, as the opening of a new public road, at that time, greatly benefited the lands through which they passed, the grants were made on the implied condition, that such portions of the land granted might be taken for public use as the public interest might thereafter require. *Segin v. St. Maxent's Syndic*, 1 M. R. 231.

The court further recognized, that in the absence of any constitutional provision to the contrary, the Legislature of Louisiana had succeeded to the rights and powers of the colonial governments.

It is true, that, in 1818, an act was passed, providing that previous compensation should be made to the owners for land so taken. But, as observed by the Supreme Court, in the case of *Renthrop*, the acts of our Legislature cannot restrain the powers of their successors; and, the act of 1829, giving plenary and unlimited power to the Police Jury of the parish of Concordia, in relation to roads and levees, abrogated, as to them, the act of 1818, and restored to them the powers which they held before its passage. Ferries, being necessarily a part of public roads, are subject to the same rules.

The counsel for the plaintiff argued, that, as he kept a ferry at the same place, the value of which would be materially diminished by the new ferry established, he is entitled to an adequate compensation for the alleged injury. This is an error. If he was entitled to compensation, it would be only for the portion of his land taken and occupied by the ferry. The laying out of a road and the establishing of a ferry, are acts of sovereignty which do nobody harm. No warranty or right to indemnify ever arises from them, without an express stipulation to that effect. *Merlin Rep. Trait des Souv.* We are of opinion that the judgment ought to be affirmed.

It is therefore ordered, adjudged and decreed, that the judgment of the court below be affirmed, with costs.

GILLESPIE  
v.  
FREEMAN.

SAME CASE—ON A RE-HEARING.

By the court:

PRESTON, J. After a further and full examination of the case, we are satisfied the judgment heretofore rendered is correct, for the reasons given.

It is therefore ordered, adjudged and decreed, that the judgment heretofore rendered by this court, on the 27th March, 1848, remain undisturbed.

MASSEY v. HERMAN et al.

Where property was sold under execution, according to a plan made by the defendant, which proved to be defective; and a number of the purchasers had a new plan made, which they adopted; it was held, that this new plan did not bind the purchaser, who was not a party to it.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Roselius and Goold*, for the plaintiff. *G. B. Duncan*, for defendants.

By the court:\*

EUSTIS, C. J. This suit involves the question of the ownership of a square of ground in the rear of the former suburb St. Mary, between Gravier and Common streets. It was adjudged to belong to the plaintiff, and the defendants have taken this appeal.

The defendants are in possession. There is nothing in the character of the possession, as claimed on either side, which affects materially the title. The title to the property, as it is exhibited by the documentary evidence, is alone to be considered. The defendants being in possession, the plaintiff's title must first be examined.

The statement of the facts given by the learned judge of the Fifth District Court of New Orleans, is offered as the basis of the argument of the counsel for the plaintiff; its correctness is, therefore, conceded by the plaintiff.

My impression was, from the first moment I cast my eyes upon the map, which is considered as establishing the location of the square in favor of the plaintiff's right, that it was conclusive against him on the statement of the facts on which he relies. With the plans before us, scarcely any explanation would be necessary to prevent my view of the subject. I may not be successful, however, in putting it on paper without that assistance.

The square of ground claimed by the plaintiff, and in the possession of the defendants, is between Common street and Gravier street, and bounded by Adeline street on the east, or towards the river, and Jeanne street on the west. At the time the rights of these parties originated, it formed part of a large body of land in the rear of the suburb St. Mary, and was an unimproved marshy waste. The titles of both parties originated in a sheriff's sale, made under an execution, against *John Gravier*, in 1825. At this sale, *Howard*

\* *Slidell, J.*, declined to sit in this case.

MASSEY  
v.  
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*Henderson*, under whom the plaintiff claims, purchased a square of ground under this description: a square of ground, containing fourteen lots, situated in the suburb St. Mary, and designated on a plan, made by *Gravier*, by number 9. At the same sale, *Lewis Herman*, the ancestor of the defendants, under whom they claim, purchased a square of ground, containing fourteen lots, situated in the suburb St. Mary, and designated on a plan, made by *John Gravier*, as number 5.

In this plan, square number 5 is described as bounded by Common, Gravier, Adeline, and Jeanne streets; number 9, as bounded by Common, Gravier, Adeline, and Magdalen streets; and number 9, is marked as situated to the east of number 5, and on the opposite side of Adeline street, which intervenes.

This plan, which is the commencement of title of both parties, it does not appear, ever was located; it existed on paper, merely having the sanction of *Gravier*, for the purpose of effecting the sale of the land in squares. It was handed by *Gravier* to the sheriff, previous to the sale, and deposited in the sheriff's office.

By the purchase, at sheriff's sale, it appears, that *Henderson's* square called for a location between Adeline street and Magdalen street, and *Herman's* square, for a location between the former and Jeanne street; Adeline street intervening between the two squares, and each having a part on it.

There was no location under the plan of *Gravier*, and, it is contended by the plaintiff's counsel, that there could have been none. Be it so; although I concur with my brother Preston, in thinking that, as far as the location of the part of these squares is concerned, the possibility of the location, under that plan, is a matter of absolute demonstration.

When the purchasers of the squares on Common street attempted to take possession, they discovered that *Gravier* had made a mistake, and that one of the squares, nearer the river, had been already sold to *Mr. Freret*, and, consequently, the purchaser, *Bates*, had no right whatever to any of the land sold, he having bid for what was the property of *Mr. Freret*, and not of *Gravier*, the debtor in execution. *Bringier's* plan was then made. A square was added, in the rear, to the lots on Common street, and, for the purpose of letting in *Bates*, and giving him a square, the purchasers in the rear of it, were each crowded back one square. Under this arrangement and location, the purchaser of the square between Adeline and Magdalen streets, seeks to oust the purchaser of the square between Adeline and Jeanne street.

This plan of *Bringier* was afterwards ratified by the heirs of *Gravier*, and has been recognized by the municipal authority, and the defendant is in possession of the square between Adeline street and Jeanne, as designated in that plan.

The numbers of the lots on this plan are changed; that in the possession of the defendants being numbered 9, and bearing the name of *Henderson* marked upon it, while the number and name of the defendant's are transferred to the square on the other side of Jeanne street.

It is very clear, that this change in the number and name amounts to nothing. The plan, so far as the heirs of *Gravier* were concerned, was one of location exclusively, and not of ownership. It purported nothing else; indeed, they had no right to determine, in the slightest degree, any matter of right touching the ownership, among the general purchasers, at the sheriff's sale. When it is con-

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sidered that the defendant's ancestor never was a party to this plan of *Bringier*, or the arrangements in virtue of which it was made, he cannot be held bound by it, as affecting his rights acquired under the sheriff's sale. Let him be held to it as a location, and it gives to him the square, which he has got under the description of location, which his title called for.

But, to return to the plaintiff's title. If we give the plaintiff the square in dispute, the location defeats the calls of his title. He is not then bounded by Magdalen street, on the side next the river, but by Adeline street, and is not bounded on the other side by Adeline street, but by Jeanne street. The defendants, too, who hold the square, with the servitudes of way, of light, and of drain, on Adeline and Jeanne streets, according to the calls of their title, are transferred to another square, which they repudiate, and some one else owns.

The parties in this business have undertaken to make room for a purchaser who never had any title, by displacing the several purchasers of the squares on Common street. I have not been able to discover any act of the defendants, or their ancestor, which binds them to this arrangement, and, consequently, I think the plaintiff cannot recover.

The judgment of the district court is therefore reversed, and judgment rendered for defendants, with costs in both courts.

ROST, J. I concur in this opinion.

PRESTON, J., dissenting. In 1825, many executions were issued against *Jean Gravier*. He had made a plan of that portion of the suburb St. Mary, bounded by St. Paul, Common, Bolivar and Hevia streets. He divided it, by the plans, into thirty-two squares, which the sheriff seized and sold, in January, 1825, according to the plan.

There were eight squares fronting upon Common street, numbers 29, 25, 21, 17, 13, 9, 5 and 1. The numbers 29 and 25 were reserved from the sale, as having been previously sold; number 21 was adjudicated to *Mr. Bates*, but had also been previously sold, to *Mr. Freret*, so that the purchaser acquired no title. The other five squares on Common street, were respectively adjudicated to *Licquet*, *Caillon*, *Henderson*, *Herman*, and *Goodman*. *Bates* could not obtain possession; and, in consequence of it, and other supposed inaccuracies of *Gravier's* plan, which exhibited no scale or measure of the streets and squares, an entirely new plan was made by *Louis Bringier*, Surveyor General of the State, and adopted by most of the purchasers at the sheriff's sale, by a notarial act, dated the 14th of July, 1831. By it, another square was added to those fronting on Common street, from the vacant ground of *Gravier* in the rear; and *Bates*, who had purchased nothing, was allowed the square adjudicated to *Licquet*; and so successively, *Caillon*, *Henderson*, *Herman*, and *Goodman*, were assigned the successive squares in the rear of those purchased by them. Most of the purchasers signed this act, and are, therefore, bound by it. Their locations *inter se*, are not only binding upon them by the agreement, but are probably entirely quieted by prescription.

But *Herman* never signed this act, and, of course, is not bound by it. His widow and heirs are entitled to their location, according to *Gravier's* plan, if it can be found, and there be no just reason to prevent their obtaining it. A plan should be a picture of the ground, and those who purchase by a plan, should have the ground it depicts, if possible.

The district court has made a most clear and exact statement of the material facts which the record presents, and have come to the conclusion, that it was not possible to locate these purchasers according to *Gravier's* plan, and, therefore, compels the widow and heirs of *Herman* to submit to *Bringier's* plan and



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location, although not parties to it. He presents so strong a case of equity, on behalf of the plaintiff, after an elaborate examination of all the circumstances, out of which *Bringier's* surveys and plan were adopted, not only by the purchasers, from the sheriff, of *Gravier's* property, but by the city, that I regret the defendants have not yielded to his conclusions, especially as there cannot be much difference between the value of their square and the one assigned them by the plan immediately in the rear. They insist, however, that their square can be located by *Gravier's* plan, and will submit to no other location.

I am forced, by the evidence, to decide, that they can be located by that plan, and, to yield to their demand, except so far as the streets laid out by *Bringier*, especially St. Jean street, may encroach on their location. These were adopted by the city; were publicly opened, without opposition, on behalf of the defendants; have been used for twenty years, and cannot now be disturbed. The fact, that *Bringier* opened the four streets, in front of the defendants, fifty feet wide, while, by *Gravier's* plan, they were not more than forty, if so much. Also, a different location of St. Adeline street, and other changes of the plan, will probably deprive the defendants of a front on that street, because their front may be located more than a hundred feet in the rear of its present site. If this should be the result, they must submit; for the city alone had the right to open, make, and keep in repair the streets, and were not bound by *Gravier's* location of St. Adeline street. Besides, their defence is a hard one; and they cannot maintain title to ground which their location, according to *Gravier's* plan, by which they purchased, does not call for, except by naming a street which did not exist, and which was afterwards located elsewhere.

The titles, plans, and evidence, fully prove, that St. Paul street was well known and established on the ground, at the early day at which the sheriff's sales were made, and that this street, also square 29, and Gironde street, as to their front on Common street, corresponds on *Bringier's* plan exactly with *Gravier's* plan, so that the corner of Hospital and Common street corresponds on the two plans and on the ground.

Now, the plan of *Gravier* shows five squares and five streets fronting on Common street, between that corner and the square adjudicated by the sheriff to *Dr. Herman*, according to that plan. The squares have each five lots, fronting on Common street. It is well known, and sufficiently proved, by the titles, plans, and evidence, as specially stated in *Gravier's* sale to *Freret*, and the exchange of the latter with the Charity Hospital, that the lots were each sixty French feet in width. *Gravier's* streets averaged forty French feet in width. So, that, using these data, we find, with certainty, that the corner of *Herman's* square and Common street, on the river side, should be fixed at seventeen hundred French feet, from the corner of the Hospital square and Common street, on the river side.

The city surveyor should, therefore, locate the defendants corner on Common street, on the river side, at the point this calculation gives.

They are entitled, by *Gravier's* plan, to two hundred and forty French feet on Common street, running to the rear from the point just established, by four hundred and twenty French feet in depth.

This location will probably remove the defendants upwards of one hundred feet in the rear of their present front on St. Adeline street. If so, the plaintiff is entitled to this point, with all the ground between that street and the defendants' location; no street can be opened immediately in front of the defendants

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location, without the authority of the city. They will be indemnified however, probably by having two fronts on St. Jean street.

Equity obliges me to declare also, that the plaintiff will be entitled to the defendants' rights, under the act of the 14th July, 1831, and plan of *Brugier*, and, by virtue of those rights, to locate the remainder of his quantity on the ground immediately in the rear of the two hundred and forty French feet fronting on Common street, belonging to the defendants, including in that, two hundred and forty feet on St. Jean street, which has been opened by the city, without opposition from the defendants.

There probably was some difference between the courses of the side lines on *Gravier's* and *Brugier's* plans. It is so imperfectly proved, that it cannot be considered.

I think the judgment of the district court should be reversed, and the cause remanded, with directions to the district court to cause the defendants to be located and quieted in their possessions, according to the opinions herein expressed, at the distance of fourteen hundred French feet on Common street, in the rear of the corner of that and Gironde street; and that the plaintiff should be condemned to pay the costs of the appeal.

An application for a re-hearing was refused.

#### LOWE AND PATTISON v. HENRY PENNY.

One partner cannot bind his co-partner by a note, given after the dissolution of the partnership, for a partnership debt. But if the dissolution of the partnership was not known at the time, to the person taking the note, the co-partner would be bound.

To protect one partner from the acts of the other, after a dissolution has taken place, public notice of the dissolution should be given. To those with whom the firm has traded, particular notice is necessary, or notice of the dissolution must be carried home to them.

APPEAL from the Fourth District Court of New Orleans, *Strawbridge*, J. *vs. A. N. Ogden*, for plaintiffs. *J. Ad. Rozier*, for defendant. By the court: \*  
PRESIDENT J. The defendant is sued on a promissory note, purporting to be signed by *Penny* and *Harvey*.

He denied that he signed the note, and that he was a partner of *Harvey's* at the time it was signed.

In answer to interrogatories propounded to him, he admits, that he entered into a mercantile partnership with *Harvey*, at Miller's Bluff, in Arkansas, on the 20th of November, 1844, to continue for the term of three years; but states, that he engaged in mercantile business in Mexico, during the war, and that, in his absence, *Harvey* moved from Miller's Bluff, where their partnership was established, and took his stock of goods with him, and that he received nothing from the same.

A witness states, that in the winter of 1847 or 1848, *Harvey* came to New Orleans for the purpose of purchasing goods, and applied to the plaintiffs to get him a credit for the firm of *Penny* and *Harvey*, with the house of *Samuel Jones, Jr.*, a grocer; that the plaintiffs did get them the credit, on the promise of *Harvey*, that his firm would ship cotton to meet the debt.

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\**Eustis*, C. J., did not sit in this case.

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He further proves, that the plaintiffs had to pay the debt, and, in the summer of 1848, sent him to Arkansas to close the account they had against *Penny* and *Harvey*, which he did at *Harvey's* residence, by taking the note sued upon for the groceries sold by *Jones*.

This testimony leads to the conclusion, that the debt was contracted in the winter of 1847, during the existence of the partnership of *Penny* and *Harvey*, though only liquidated, by note, in August, 1848.

It is true, as contended, that the execution of the note, after the expiration of the partnership, would not bind the firm. 5 R. R. 174. 5 N. S. 324.

But, as to the correspondents of the firm, the dissolution must be made known, either by notice, or such acts as raise a reasonable presumption of the fact. Story on Partnership, § 160. The fact that *Harvey* moved the stock from Miller's Bluff to *Harvey's* Landing, was not sufficient to raise the presumption. The distance is not shown; perhaps it was a more eligible place for the business. So the fact, that *Penny* went trading in Mexico during the war, did not necessarily induce the belief that he had ceased to be a partner. He may have taken a part of the stock to Mexico, as the most advantageous manner of carrying on the business of the firm.

It is true, as urged, that the act of a partner, after the dissolution, in giving a note for a debt of the partnership, does not bind the other party. 5 R. R. 174. 5 N. S. 324. But this principle is governed by the same rule which governs the contractor of the debt. To apply, the dissolution of the partnership must be known at the time. *Penny* should have given public notice of its dissolution, and a particular notice to those with whom the firm traded, or knowledge of its dissolution should be brought home to them. Now, the witness, who was the agent of the plaintiffs to take the note sued on, was expressly asked, in the sixth cross-interrogatory: "Were not the plaintiffs aware that *Harvey* was no longer in the employ of *Penny* at the time the note was signed?" and answers distinctly in the negative. The word employ means partnership, as applicable to the case, or nothing, and so the witness must have understood it.

It is true, that the evidence in this case, is not entirely satisfactory to us, especially as to the nature and origin of the debt, and the relation of *Penny* and *Harvey* to each other; but it satisfied the district judge, and it is not sufficient as to authorize the reversal of his judgment, which is affirmed with costs.

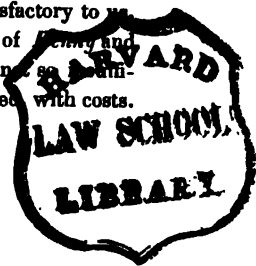
#### SAME CASE—ON A RE-HEARING.

By the court:\*

Rost, J. After a further and full examination of the case, we are satisfied the judgment heretofore rendered is correct, for the reasons given.

It is therefore ordered, adjudged, and decreed, that the judgment heretofore rendered by this court, on the 8th of December, 1851, remain undisturbed.

\* *Slidell, J.*, was absent.



## JOSHUA P. TATUM v. WRIGHT, WILLIAMS &amp; Co.

Plaintiff sold his cotton, in Arkansas, to a purchaser, who paid the largest proportion of the price in counterfeit bank notes; the purchaser brought the cotton to New Orleans, and defendants advanced on it. Plaintiff sued defendants for the value of the cotton. It was held, that he could not recover, notwithstanding the statute of Arkansas provides that the owner may recover the property out of which he has been swindled, from any subsequent holder. And, by the court: We cannot enforce a rule, resting for its exercise in comity, to the detriment of the rights of our own citizens, secured under our own laws, and the interests of commerce. The plaintiff, in this case, by putting his cotton in the possession of the purchaser, as owner, reposed confidence in him, gave him credit, and enabled him to commit a fraud on the defendants; and the equity of the original owner is not equal to that of the defendants, who have parted with their money, on the faith of a state of things which the plaintiff, himself, was the cause of being created.

**A** PPEAL from the Second District Court of New Orleans, *Lea, J. Bonford* and *Finney*, for plaintiff. *Thos. Allen Clarke*, for defendants. By the court:

EUSTIS, C. J. The plaintiff, who is a planter, residing in the State of Arkansas, recovered judgment against *Wright, Williams & Co.*, cotton factors of this city, for the sum of seven hundred and one dollars, being the value of fourteen bales of cotton. The defendants have taken this appeal.

The substance of the plaintiff's case, as stated in his petition, is this: The plaintiff's cotton was in a warehouse in Wilmington, Union county, Arkansas, where the plaintiff lives. A man by the name of *Williams*, representing himself as a member of the defendants' house, purchased the cotton from the plaintiff, on or about the 12th of February, 1851. The plaintiff delivered the cotton, and received in payment of the price, seventeen bills, purporting to be of the Union Bank of this city, of fifty dollars each, and some forty dollars in money. On the day of the sale, the cotton was shipped on board a steamer, and consigned to to the defendants, in New Orleans, who received it on its arrival. The man, calling himself *Williams*, was a swindler, and the notes were counterfeit, and the plaintiff was thus defrauded and cheated out of his cotton. The plaintiff contends, under these facts, that he was never divested of the ownership of the cotton, and so held the district judge, who gave judgment accordingly.

It appears the cotton was shipped, under a bill of lading, to the defendants. On the arrival of the steamer, *Williams* called at the defendants' counting-house, stating that he had come down with the cotton, and on the receipt of the bill of lading, with other bills of lading from the clerk of the boat, the defendants advanced him \$500 on the shipment.

The argument in favor of the plaintiff's case is, that the title or right of ownership of *Williams*, must be determined by the laws of Arkansas, the place where the purchase was made; and if, by those laws, the property was not vested in him, by his purchase, no transmission of the thing elsewhere, or any transfer by sale or otherwise, could remedy this want of title, and consequently the title remained unchanged in the plaintiff. It is said, and it seems to be conceded, that a statute of Arkansas makes the crime of swindling larceny, and provides that the original owner may recover his property, out of which he has been swindled, against any subsequent holder. The effect of this statute would be to make the title acquired by *Williams* absolutely void.

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Authorities have been adduced in support of this argument which, it is contended, are uncontradicted, and that the rule is well established, that a title void in the place where it is created and acquired, is void every where, and can obtain no validity by the transmission of the subject of it to another jurisdiction. We have, on several occasions, been very much embarrassed in the application of what are assumed to be established rules in the conflict of laws, and we have been admonished of the danger of recognizing any rule as of universal application, under all contingencies and circumstances, without any exception whatever. The facts of this case, we think, prevent it from falling under the rules urged by counsel as exclusively regulating it.

From the evidence, and indeed from the plaintiff's own statement of his case, it is manifest, that at the time of the sale of the cotton, New Orleans was to be its destination, and that it was to be sent there for purposes of traffic and resale. The swindler personated a member of the mercantile house in this city; the cotton was in a warehouse on the bank of the river, and, the plaintiff himself alleges, was, on the day of the sale, shipped on board the steamer bound to New Orleans, and consigned to the defendants' house.

There is no question as to the agreement to sell, and the delivery, under the agreement, of the cotton to the purchaser, nor as to the receipt of some forty dollars in money and the bank notes in payment of the price. Under the common law, which prevails throughout the United States, these facts would vest the property in the vendee, and a sale by him to a *bond fide* purchaser, for a valuable consideration, would be valid. It is the same under our system of jurisprudence.

The plaintiff transferred the possession of the cotton, with the intention of divesting himself of it. Knowing the purpose for which the possession of it was sought, and for which it was to be made available, he surrendered the dominion over it, and enabled the purchaser to transmit it to its destination, as cotton is usually sent to market, for sale. He was cheated by false tokens and false representations. But the delivery to the purchaser *animo demini* enabled the purchaser to appear as the owner, and obtain a *bond fide* advance on the cotton, in the ordinary course of trade in this market. This is not a delivery to an agent or a trader, but to a person whose avowed object was to use it in commerce in New Orleans.

Supposing the effect of the statute of Arkansas to be as contended for by the counsel for the plaintiff, we cannot enforce a rule, resting for its exercise in comity, to the detriment of the rights of our own citizens, secured under our laws, and the interests of commerce.

The plaintiff, in this case, by putting his cotton in the possession of the purchaser, as owner, reposed confidence in him, gave him credit and enabled him to commit a fraud on the defendants; and the equity of the original owner is not equal to that of the defendants, who have parted with their money, on the faith of a state of things which the plaintiff himself was the cause of being created.

The judgment of the district court is therefore reversed, and judgment rendered for the defendants, with costs in both courts.

## JULIUS and ANDREW SIMON v. M. M. MILLER.

Innkeepers are responsible only for what is usually and ordinarily in the trunks of travelers—their clothes and the money necessary for their journey. But the landlord is not responsible for the unknown treasure of the traveler, unless placed in his hands.

The room assigned to a traveler, by an innkeeper, is the proper place for the deposit of his trunk.

**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. J. Livingston*, for plaintiff. *C. Roselius*, for defendant. By the court:•  
(*Preston, J.*, dissenting.)

**PRESTON, J.** The plaintiffs arrived in this city, from California, on the 10th of January, 1851, with a large amount of gold dust. They allege, that, on their arrival, they, being strangers, were recommended by persons unknown to them and taken to an inn, known as the "Indian Queen," at the corner of Girod and Levee streets, kept by the defendant; that their gold dust was deposited with a friend, until the day of its sale, on the 14th of January; that they engaged their passage on a steamboat up the river, to start that day; that about 12 o'clock, they took their gold to the inn kept by the defendant, and deposited the same in their trunk in a room in the inn; that at dinner time, about one o'clock, they went to dinner, first locking the trunk containing their gold, and the door of their room; that one of them, *Julius*, being quite unwell, remained but a few minutes in the dining room, and returned immediately to his room, the door of which he found open, and, on entering, found the trunk, that had contained the gold, forced open, and that the gold had all been taken therefrom, amounting to five thousand and two hundred and twenty-five dollars, for which they bring suit against the defendant.

They substantially proved the facts as alleged, obtained judgment, and the defendant has appealed.

On the facts proved, as alleged, the plaintiffs rely, in support of their judgment, on articles 2936, 2937 and 2938 of our code. They are as follows: "An innkeeper is responsible, as depositary, for the effects brought by travelers who lodge at his house. He is responsible for such effects, even though they were not delivered into his personal care, provided they were delivered to a servant or person in his employment. He is responsible if any of the effects be stolen or damaged by his servants or agents, or by strangers going and coming in the inn."

The defendant contends, that the facts do not render him liable, under these articles; and, even if they did, that he is exonerated by the next article of the code, which provides, that the innkeeper is not responsible for what is stolen by force and arms, and with exterior breaking open of doors, or by any other extraordinary violence.

The facts do not show, that the plaintiffs deposited this large amount of gold with the defendant, or with his agents or servants. They deposited it in their own trunk, in their room, without the knowledge of the defendant or of those in his employment. There was a circumstance, in all probability known to the defendant, calculated to induce him to believe no such sum was even in his

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\* *Stidell, J.*, was absent.

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house, and to hush his vigilance. For, four days before, they had deposited their gold, not in his house, but with a large commercial firm. Indeed, after they sold their gold dust, they intended again to deposit the proceeds with a commercial house, but missed their way and got to the hotel. They thus manifested their own opinion, that the hotel was not a safe and suitable place to deposit so large an amount of gold. Indeed, it is proved, that they were warned of this on their first arrival, and deposited their treasure in a banking house.

Yet, if they had actually deposited the gold with the defendant, he would have been liable. The deposit of their trunk and clothes in the room assigned them, was such a deposit as would have rendered the innkeeper responsible for the loss of those things; for that was the proper place for keeping them, and he was bound to use the diligence necessary to preserve from loss, articles of such magnitude and comparatively of little value. It was not the proper place to deposit five thousand dollars in gold. The landlord would not have allowed the deposit there if he had been informed of it; or, if he had permitted it, during the brief time the plaintiffs were dining, he would have placed a watch, to have avoided a responsibility for perhaps more than he had accumulated by the toil of his life.

To render the defendant responsible, the plaintiffs should have given the gold into the possession of the landlord. It may be conceded, that the five thousand dollars in gold were the effects of these travelers; but they were effects of such immense value, compared with their magnitude, that they are always deposited in the personal care of landlords, or those employed by them. Even then, the responsibility of insurers is enormous, compared with the profits of a night's lodging. It is impossible to extend this responsibility to the landlord, when the whole loss has occurred from the want of the usual care and notice of the travelers. They are responsible only for what is usually and ordinarily in the trunks of travelers: their clothes, and the money necessary for their journey. But, the landlord has nothing to do with what is carried as the fortune of the traveler, unless placed in his hands. Californians, who have earned their money by mining, usually carry it in belts around their persons; merchants, in bills of exchange, in their pocketbooks. More Californians return without gold than with it, and their appearance by no means warns landlords that they are loaded with gold. The landlord had no idea that such valuables were exposed in any part of his crowded house; if he had, he would have insisted upon its being in his own special charge and under his own private lock and key. He should, at least, have notice of the contents of trunks and packages, if they contain more money than the ordinary traveling expenses. We examined this subject with great care, in the case of *The Merchants and Traders' Bank v. The Steamboat Anna and Owners*, and were forced to the conclusion, that carriers, whose responsibilities, by an express article of the code, are the same as those of innkeepers, were not liable for hidden treasure, placed on their boat; nor can the innkeeper be liable for unknown treasure happening in his house. It is the lot of man to meet with misfortunes as to his property. He must suffer the loss, unless there be special reasons for imposing the burden on other innocent persons. They do not exist in the present case, and the plaintiffs must submit to the providence that, in giving them gold, no doubt for wise purposes, permitted them to be plundered of the proceeds of all their toil and suffering.

The judgment of the district court is reversed, and judgment is rendered for the defendant, with costs in both courts.

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EUSTIS, C. J. My impression is, that the defendant, as an innkeeper, would be liable to the plaintiffs, in the event of loss, under articles 2936, 2937, and 2938 of the code, for the value of his baggage and appliances for traveling, and also for such sum as might be deemed necessary for his expenses, according to his condition in life and the journey undertaken. The large amount of gold in his trunk, which was stolen, it is not pretended, comes within either of these descriptions.

I see no evidence in the character of the innkeeper, of his inn, or of those who frequent it, which would make this case an exception to the general rule.

There being no such proof, I concur in the conclusion of Mr. Justice Preston, that the judgment ought to be reversed, and judgment rendered for the defendant.

ROSE, J., dissenting. The only exceptions which the code makes to the responsibility of the innkeeper, are, when the effects, brought to his house by travelers, are stolen by force of arms, or by exterior breaking open of doors, or by any other extraordinary violence. This case comes within none of them.

The contents of the plaintiff's trunk were stolen from his room, in the defendant's house, at mid-day, during dinner, and, as it would seem, by persons who were seen by the clerk, who had charge of the house at that time, and suffered by him to go up stairs, against the rule of the house, although he says that he suspected them. Such a want of ordinary care cannot be justified; and I have no hesitation in saying, that this is a case for the application of the article 2936 of the code. The fact, that the trunk was brought into the house first, and the gold put into it afterwards, does not diminish the responsibility of the defendant. It is as if new suits of clothes, purchased after the arrival of the plaintiffs, had been put into the trunk, and stolen.

The only question which presents any difficulty to my mind is, whether the article of the code should be applied in all its rigor, or whether that rigor should be tempered by the equitable considerations pressed upon us in behalf of the defendant.

It has been held in France, and such seems to be the law there at this time, that the extent of the responsibility of innkeepers depends upon the circumstances of each particular case; and that, when money has been stolen from a traveler, in their houses, this responsibility should be restricted to the sum, which, from the circumstances and wants of the journey, may be presumed to have formed part of his effects. *D. C. Blandwood et al., Dalloz, 1837, part 2, p. 4.* Troplong says, he does not disapprove of that decision, in particular cases, because it is equitable, and maintains the just authority of the article of the code, while it gives due weight to a class of circumstances which should sometimes be taken into consideration. But he further says, that the principle must not be abused by too general an application of it to all cases; that care must be taken not to rate too low the share of money and valuables necessary to travelers, and that, in making the estimate, all circumstances worthy of consideration should be consulted. See Troplong Depot, No. 226.

I feel disposed to adopt the principle, with those limitations, and to apply it to the facts of this case.

The plaintiffs, at the time of their arrival from California, having asked a hack driver for a good tavern, were taken to the defendant's house, which, I infer from the evidence, was mainly frequented by persons returning from the gold regions. The anxiety of the defendant to obtain their custom, arose from his knowledge, that they brought gold with them; and his house should have



been administered so as to give them perfect security for it. This I take to be a material circumstance in the journey of the plaintiffs, and one which, in my opinion, makes the defendant responsible, for as much as they might reasonably be presumed to have brought with them. I cannot consider that amount, between the two, as being less than two thousand dollars. And I think the plaintiffs should have judgment for that sum. See the case of *De Magnencourt* Troplong Depot, No. 225.

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MILLER.

Application for a re-hearing refused.

## H. W. PALFREY, Receiver of the Exchange and Banking Company, v. CORNELIUS PAULDING.

Although a bank charter contains no provision for its forfeiture in the event of a failure to pay specie; yet, where there was in force, at the date of the charter, a general law to the same effect, the forfeiture can, under that law, be enforced.

The Exchange and Banking Company was one of the banks that had incurred the forfeiture of their charter, by the suspension of specie payments, and the act of 1839 was intended to apply to it.

The acts of the corporate officers of a corporation, are admissible evidence from which the fact of acceptance of a particular charter may be inferred. It is not indispensable to show a written instrument, or vote of acceptance, on the corporation books. It may be inferred from other facts, which demonstrate that it must have been accepted. *Rost, J.*

The stockholders of the Exchange and Banking Company are not personally bound for debts contracted by the bank, after the promulgation of the act of 1839. *Eustis, C. J.*

I am not satisfied that the act of 1839 was accepted by the bank in such a manner, as to bind creditors of the corporation. *Slidell, J.*

The power granted by the 1st section of 438th article of the Civil Code, is a power to be exercised under conditions. *Slidell, J.*

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J.* *Bradford and Gould*, for plaintiff. *Hoffman and Ogden*, for defendant.

By the court: (*Preston, J.*, declined to sit in this case.)

*Rost, J.* The defendant held thirty shares of the stock of the Exchange and Banking Company. The shares were of one hundred dollars, upon which fifty dollars have been paid. The corporation is insolvent, and its charter has been adjudged to be forfeited, at the suit of the State.

The plaintiff, who now administers the affairs of the corporation, as receiver, claims from the defendant twenty dollars per share, on the fifty dollars unpaid, alleging that such a contribution is necessary, on the part of all the solvent stockholders, to extinguish the outstanding liabilities of the company.

That portion of the answer which I deem material to the issue, is as follows: "Your respondent alleges, that the second section of the act of the 14th March, 1839,\* mentioned in the plaintiff's petition, was not unconstitutional and void, but was a constitutional and valid law, and entirely exonerated him from all liability on account of stock in the said company, if any such liability existed at the time, which he denies.

"He further alleges, that the assets of the bank, then, far exceeded its liabilities, and it was solvent, enjoyed, for years after the law of 1839, good credit,

\*The act of 1839 referred to, is entitled, An Act to relieve such of the banks of this State whose Charter may have been forfeited by a suspension of specie payments, from such forfeiture. Acts 1839, p. 66.

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and its liabilities, at the time the forfeiture of the charter was declared, and especially those which it is pretended now exist, were contracted subsequently to the passage of said law of 1839, and upon its faith, and not upon the faith of the subscription for stock, annulled by that law; and the pretended creditors of the company, at this time, have no claim whatsoever, upon the stockholders whose subscriptions were so far annulled by law."

The act of 1839, referred to in the answer, is entitled, an act to relieve such of the banks of this State, whose charter may have been forfeited by a suspension of specie payments, from such forfeiture.

The first section reinstates all such banks, in all the powers, rights, and privileges, conferred on them by their respective charters, notwithstanding any forfeiture thereof.

The second section provides, that such of said banks as have not their stock paid in, may suspend the payment of said stock until the 1st day of February, 1841; and that the amount actually paid in at that period, shall be deemed the capital stock of said banks; and they are, in that case, restrained from doing business on any larger amount of capital, under the rules prescribed by their charters.

The third, and last, section, makes it the duty of all the banks to settle, and pay the balances due by them to each other, every Monday morning, in gold or silver; and to publish, on the first Monday of each month, in at least one of the newspapers of the city of New Orleans, a statement showing the gross amount of their circulation and deposits, and the amount of specie in their vaults.

The plaintiff's counsel concede, that if the defendant can avail himself of the dispositions of the law, the action will be defeated. But they insist that he can not, on two grounds: 1. Because the law was not intended by the Legislature to apply, and did not apply, to the Exchange and Banking Company. 2. That the defendant can not, under any circumstances, avail himself of its provisions, because it never was accepted by that corporation.

In support of the first ground, it is said that, by the 22d section of the charter of the Exchange and Banking Company, the penalty which it incurred, by the suspension of specie payments, was the liability to pay twelve per cent per annum interest to its creditors, on the amount of its obligations; that, as it is not provided, as is the case with some other bank charters, that the suspension shall work a forfeiture of its franchisees, the Exchange and Banking Company was not one of the banks whose charter had been forfeited by the suspension of 1837, and to which, alone, the act of 1839 is applicable.

This argument rests upon the authority of the case of the *State v. The Tombigbee Bank*, 2 Stewart's Ala. Rep. That case, in the brief, is stated as follows: The Tombigbee Bank was chartered in the year 1817. After the passage of the act of incorporation, a general law was enacted by the Legislature, declaring that all bank charters should be held forfeited, by a suspension of specie payments. The bank in question suspended payment in specie, for the term of one year. On a *quo warranto* issued against the bank, it was held that the charter, containing no provision authorizing its forfeiture in case of a suspension of specie payments, such a suspension did not, under the charter, destroy its franchise; that the charter was a contract, and that the subsequent law, creating a new ground of forfeiture, was unconstitutional in its application to that bank.

This authority, considered with reference to our laws on the subject of corporations, is conclusive against the plaintiff, on this part of the case. It is manifest that, if the general law creating the forfeiture had been in force at the time

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the charter was granted, the court would have viewed it, as a part of the contract which they say the charter created, and the forfeiture would have been enforced. A general law, of the same description, was enacted by the Legislature of Louisiana, ten years before the date of the charter of the Exchange and Banking Company, and has been in force ever since. The second paragraph of art. 438, C. C., provides that corporations legally established, may be dissolved by the forfeiture of their charter, when they abuse their privileges, or refuse to accomplish the conditions on which such privileges were granted; in which case the corporation becomes extinct, by the effect of the violation of the conditions of the act of incorporation. Now, one of the express conditions of the act of incorporation of the Exchange and Banking Company was, that it should never suspend the payment of its obligations in specie, and a violation of that vital condition, in 1837, was, unquestionably, a ground of forfeiture.

In the case of the *Atchafalaya Bank v. Dawson*, it was held, that under this disposition of the Civil Code, the effect of the suspension of specie payments was the same on all bank charters, whether or not they contained a clause of forfeiture. The question was then thoroughly examined, and I deem a reference to the opinions delivered in that case sufficient. 13 L. R. 497.

The Exchange and Banking Company was one of the banks that had incurred the forfeiture of their charters, by the suspension of specie payments, and the act of 1839 was intended to apply to it. It is well known, that the exception it made, had exclusive reference to such of the banks as had not suspended specie payments in 1837.

It is next contended, that the act of 1839 never was accepted by the Exchange and Banking Company.

Having shown that the charter of this corporation had been forfeited in 1837, the ground that it did not accept the law, relieving it from the penalty of the forfeiture, can hardly be considered serious, and is evidently taken under a misapprehension of what constituted an acceptance in that case. The law of 1839, is an ordinary act of legislation, making no provision whatever for its express acceptance by the banks, before it could bind them. If it were conceded, therefore, which I am not prepared to do, that the charter is purely a contract between the State and the bank, and that any modification of that contract, by the Legislature, must be accepted by the bank, before it is binding, in this, as in other contracts where no express acceptance is required, it may be implied from the acts of the bank, or from its silence or inaction, if these can, from circumstances, be thus interpreted, or if they raise a legal presumption of assent. C. C. 1805.

In relation to the question of acceptance of a particular charter, by an existing corporation, the acts of the corporate officers are admissible evidence, from which the fact of acceptance may be inferred. It is not indispensable to show a written instrument, or vote of acceptance, on the corporation books. It may be inferred from other facts, which demonstrate that it must have been accepted. *Bank of U. S. v. Dandridge*, 12 Wheaton, 71, and cases there cited.

Under the act of 1839, the Exchange and Banking Company continued its operations, as if no forfeiture had taken place.

As long as it continued to pay specie, it made weekly settlements with the other banks, and paid on demand, in specie, the balances due them. It also furnished, and caused to be published, monthly statements of its situation. This was a compliance with all the requisitions of the act of 1839. But the silence and inaction of this corporation, are still more significant than its acts. By a law

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amending the original charter, and duly accepted by the bank, the whole amount of the stock was ordered to be called in, within twenty months from its passage, and the result has shown that this provision was absolutely necessary, to sustain the credit of the bank. But, in violation of its duty to the public, it availed itself, to the utmost, of the second section of the act of 1839. The board made no further calls upon the stockholders; and, while under the charter, the whole stock should have been paid up in 1840, fifty dollars per share have remained unpaid to the present day. No clearer case of implied acceptance has ever been made out in a court of justice, and I feel bound to conclude, as we did in the case of *Hepburn and Turpin v. The Commissioners of the New Orleans Exchange and Banking Company et als.*, 4 Ann. 87. in which it was admitted that the Exchange and Banking Company had accepted the act of 1839, that the capital of the bank must be limited to the amount paid in on the 1st of February, 1841; and, that the stockholders are not personally bound for debts contracted by the bank, after the promulgation of the act of 1839. The defendant has expressly denied that the present creditors were creditors of the Bank at that time, and as the right of the receiver to recover rested upon proof of that fact, it was incumbent upon him to make that proof. So far from having done so, his witnesses prove the reverse, with respect to all the claims of which they know the origin.

I have examined the case, on the hypothesis that an acceptance of the act of 1839, on the part of the banks, was necessary. But I do not wish to be understood as deciding that point. If charters are contracts, they are contracts which the Legislature may, in certain cases, dissolve. The powers it possesses over charters subsequently granted, by the first paragraph of art. 438, C. C., are not the less real for having been dormant heretofore, and it is a serious question, whether any acceptance of the conditions appended to the remission of the forfeiture, was necessary.

I am of opinion, that the judgment against the defendant must be reversed, and a judgment rendered in his favor.

It is therefore ordered, that the judgment in this case be reversed, and that there be judgment in favor of the defendant, with costs in both courts.

EUSTIS, C.J. My impression is, that the authorities, referred to by Judge Rost, support his opinion, concerning the inference to be drawn from facts showing an acceptance of an amendment, or change of a charter of incorporation; but, as the point was not urged at law, and as I concur with him in his conclusion, that the judgment of the court below ought to be reversed, I prefer placing my assent on the other ground given in support of his opinion, to wit, that the stockholders are not personally bound for debts contracted by the bank, after the promulgation of the act of 1839, and it is not proved that any of the debts represented by the plaintiff, were contracted previous to that time.

SLIDELL, J., dissenting. I am not satisfied that the act of 1839 was accepted by the bank, in such a manner as to bind creditors of the corporation. The report of the committee of the Legislature, which is for the first time brought to our attention, seems to me to show, satisfactorily, that down to the date of that report, there was no acceptance.

Suspension of specie payments may have been a cause of forfeiture, under the charter of this corporation; but the State did not sue for it, until a long time subsequent to the act of 1839. See 13 L. R. 497.

The power granted by the 1st section of the 438th article of the Civil Code, is a power to be exercised under conditions.

## D. R. COULTER v. ELIHU CRESSWELL et al.

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Until the universal legatee makes himself a party to the suit, the act of the executor in defending it, is binding upon the former.

Where the suit was brought against C. in the Second District Court, and his succession was afterwards opened in the Fourth. It was held that the Second District Court had jurisdiction to try the suit which had been brought.

No one can be bound by testimony not taken contradictorily with him. Therefore, testimony taken between the parties to the suit, before the warrantor is made a party, cannot be used against the latter.

The plaintiff, in a redhibitory action, cannot recover the expense for the transportation of the slave from the place where bought, to where he died.

**A**PPEAL from the Second District Court of New Orleans, *Lea, J. Elmore* and *King*, for plaintiff. *J. Ad. Rozier*, for defendants. *C. Dufour*, for warrantor. By the court:

**PRESTON, J.** This is a redhibitory action, commenced against the estate of *Cresswell*, for the price of a slave sold by the deceased to the plaintiff, and damages.

The slave, with two children, was sold by *Cresswell* to the plaintiff, on the 17th of March, 1851, for six hundred dollars. She was fully guaranteed against the maladies prescribed against by law. Immediately after the sale, she was taken on board a steamboat, and conveyed to Union county, in the State of Arkansas, where the plaintiff resided. She died eleven days after the sale, of a disease, as the plaintiff alleges, called *augina pictores*, dependant on a diseased heart.

It was evident, on a *post mortem* examination, from the preternatural growth of the heart, and *pr. stuber auces*, and obstructions about it, that the disease was of long standing, and must, at the time of the sale, have been incurable.

The slave became so unwell as to require medical aid within three days after the sale. This raises a presumption, that she was affected with the disease at the time of the sale. The presumption is rendered conclusive, by the facts stated by the witnesses. We have no doubt, the woman was affected with a redhibitory malady at the time of the sale, and died of the disease.

There is no foundation for the suggestion, that the plaintiff did not exercise all proper care of the slave during her sickness. He engaged medical aid while it was yet supposed the disease might be but a cold, gave up his own state-room in the steamboat to her, and took the same care of her as if she had been a white person of his family. He took her, to be sure, from the landing in Arkansas, to his plantation, in his wagon; but he made her as comfortable, with mattresses, and otherwise, as possible. This was no doubt the easiest mode of conveyance that could be procured, and there is no proof that she was jolted, as suggested, over the rough roads of Arkansas.

A bill of exceptions was taken to the introduction, in evidence, of the testimony of witnesses residing in Arkansas, obtained under a commission, on the ground that *Mrs. Cresswell*, the universal legatee of *Elihu Cresswell*, had had no opportunity to cross-examine the witnesses. The suit was brought against the executor of *Cresswell*. He filed very searching cross-interrogatories to the

## JOSHUA P. TATUM v. WRIGHT, WILLIAMS &amp; Co.

Plaintiff sold his cotton, in Arkansas, to a purchaser, who paid the largest proportion of the price in counterfeit bank notes; the purchaser brought the cotton to New Orleans, and defendants advanced on it. Plaintiff sued defendants for the value of the cotton. It was held, that he could not recover, notwithstanding the statute of Arkansas provides that the owner may recover the property out of which he has been swindled, from any subsequent holder. And, by the court: We cannot enforce a rule, resting for its exercise in comity, to the detriment of the rights of our own citizens, secured under our own laws, and the interests of commerce. The plaintiff, in this case, by putting his cotton in the possession of the purchaser, as owner, reposed confidence in him, gave him credit, and enabled him to commit a fraud on the defendants; and the equity of the original owner is not equal to that of the defendants, who have parted with their money, on the faith of a state of things which the plaintiff, himself, was the cause of being created.

**A**PPPEAL from the Second District Court of New Orleans, *Lea, J. Bonford* and *Finney*, for plaintiff. *Thos. Allen Clarke*, for defendants. By the court:

EUSTIS, C. J. The plaintiff, who is a planter, residing in the State of Arkansas, recovered judgment against *Wright, Williams & Co.*, cotton factors of this city, for the sum of seven hundred and one dollars, being the value of fourteen bales of cotton. The defendants have taken this appeal.

The substance of the plaintiff's case, as stated in his petition, is this: The plaintiff's cotton was in a warehouse in Wilmington, Union county, Arkansas, where the plaintiff lives. A man by the name of *Williams*, representing himself as a member of the defendants' house, purchased the cotton from the plaintiff, on or about the 12th of February, 1851. The plaintiff delivered the cotton, and received in payment of the price, seventeen bills, purporting to be of the Union Bank of this city, of fifty dollars each, and some forty dollars in money. On the day of the sale, the cotton was shipped on board a steamer, and consigned to to the defendants, in New Orleans, who received it on its arrival. The man, calling himself *Williams*, was a swindler, and the notes were counterfeit, and the plaintiff was thus defrauded and cheated out of his cotton. The plaintiff contends, under these facts, that he was never divested of the ownership of the cotton, and so held the district judge, who gave judgment accordingly.

It appears the cotton was shipped, under a bill of lading, to the defendants. On the arrival of the steamer, *Williams* called at the defendants' counting-house, stating that he had come down with the cotton, and on the receipt of the bill of lading, with other bills of lading from the clerk of the boat, the defendants advanced him \$500 on the shipment.

The argument in favor of the plaintiff's case is, that the title or right of ownership of *Williams*, must be determined by the laws of Arkansas, the place where the purchase was made; and if, by those laws, the property was not vested in him, by his purchase, no transmission of the thing elsewhere, or any transfer by sale or otherwise, could remedy this want of title, and consequently the title remained unchanged in the plaintiff. It is said, and it seems to be conceded, that a statute of Arkansas makes the crime of swindling larceny, and provides that the original owner may recover his property, out of which he has been swindled, against any subsequent holder. The effect of this statute would be to make the title acquired by *Williams* absolutely void.

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Authorities have been adduced in support of this argument which, it is contended, are uncontradicted, and that the rule is well established, that a title void in the place where it is created and acquired, is void every where, and can obtain no validity by the transmission of the subject of it to another jurisdiction. We have, on several occasions, been very much embarrassed in the application of what are assumed to be established rules in the conflict of laws, and we have been admonished of the danger of recognizing any rule as of universal application, under all contingencies and circumstances, without any exception whatever. The facts of this case, we think, prevent it from falling under the rules urged by counsel as exclusively regulating it.

From the evidence, and indeed from the plaintiff's own statement of his case, it is manifest, that at the time of the sale of the cotton, New Orleans was to be its destination, and that it was to be sent there for purposes of traffic and resale. The swindler personated a member of the mercantile house in this city; the cotton was in a warehouse on the bank of the river, and, the plaintiff himself alleges, was, on the day of the sale, shipped on board the steamer bound to New Orleans, and consigned to the defendants' house.

There is no question as to the agreement to sell, and the delivery, under the agreement, of the cotton to the purchaser, nor as to the receipt of some forty dollars in money and the bank notes in payment of the price. Under the common law, which prevails throughout the United States, these facts would vest the property in the vendee, and a sale by him to a *bond fide* purchaser, for a valuable consideration, would be valid. It is the same under our system of jurisprudence.

The plaintiff transferred the possession of the cotton, with the intention of divesting himself of it. Knowing the purpose for which the possession of it was sought, and for which it was to be made available, he surrendered the dominion over it, and enabled the purchaser to transmit it to its destination, as cotton is usually sent to market, for sale. He was cheated by false tokens and false representations. But the delivery to the purchaser *animo demini* enabled the purchaser to appear as the owner, and obtain a *bond fide* advance on the cotton, in the ordinary course of trade in this market. This is not a delivery to an agent or a trader, but to a person whose avowed object was to use it in commerce in New Orleans.

Supposing the effect of the statute of Arkansas to be as contended for by the counsel for the plaintiff, we cannot enforce a rule, resting for its exercise in comity, to the detriment of the rights of our own citizens, secured under our laws, and the interests of commerce.

The plaintiff, in this case, by putting his cotton in the possession of the purchaser, as owner, reposed confidence in him, gave him credit and enabled him to commit a fraud on the defendants; and the equity of the original owner is not equal to that of the defendants, who have parted with their money, on the faith of a state of things which the plaintiff himself was the cause of being created.

The judgment of the district court is therefore reversed, and judgment rendered for the defendants, with costs in both courts.

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The plaintiff next issued execution on the judgment, which has been returned unsatisfied. He has now sued *Boyle* and *Price* on their bond, alleging that they made themselves parties to the suit, bonded the boat sequestered, and have violated the condition of their bond by not subjecting her to his execution, or satisfying his judgment as they bound themselves to do. Judgment by default, was taken against them, and was confirmed. *Boyle* moved to annul the judgment, which was refused as to him, and he has appealed.

The leading grounds of argument in support of his appeal are: 1. That the plaintiff having elected his remedy of attachment against the steamboat *Mohawk*, could not afterwards proceed by sequestration. 2. That there was no cause set forth for a sequestration in either the affidavit or petition for a sequestration, the funds having been supplied for the use and benefit only of the boat, not for her necessities as required by the code. 3. That the record shows that there has been no judgment rendered in the suit by sequestration, and that the condition upon which the sequestration bond, given by the defendants, was to become absolute, has never happened. 4. That the petition and exhibits filed in the present suit, show that no such judgment, as has been rendered, could legally have been rendered against the defendants, and it is contrary to law and to the evidence.

The proceedings of the plaintiff have certainly been irregular and inaccurate. He should have caused his supplemental petition to have been served upon the owners of the boat; should have taken judgment by default, and had it confirmed against them, and not against the captain and clerk alone. And he should have had his privilege upon the boat sequestered, decreed contradictorily with the owners.

But can the judgment, appealed from, be set aside and annulled for these irregularities, or any of the reasons urged by the defendant? He is chargeable with equal errors and defaults. He, with his partner, purchased the steamboat *Mohawk*, while a suit was pending against her for a debt of the owners. He voluntarily made himself a party to that suit by filing in it his affidavit, that he and *Price* were the owners of the boat. They bonded the boat when sequestered, on a claim of privilege, for money supplied for her use and benefit during the last voyage. Being thus parties to the suit and to the sequestration, they should, by answer, intervention or otherwise, have defended it, if there was a defence. Had they done so, the irregularities complained of would not have occurred. If the plaintiff had no privilege it would have been so decreed, and the sequestration have been dismissed.

Had the defendant presented the irregularities in the plaintiff's proceedings and his other grounds of defence, by exception, answer or otherwise, to the suit on his bond, he might have obtained relief, if they were well founded. But he suffered judgment by default, to be made final, and now rules the defendant to annul it for reasons, which should have been formally presented before issue joined by a judgment by default.

Both parties being equally in default as to the irregularities in these suits, we will yield to that substantial justice between them which, as far as we can judge from the record, we believe has been rendered.

We think substantial justice has been done, because the bill of exchange purports to have been given on account of the boat, and it has never been attacked by the owners as not having been given for her use. The defendant purchased the boat while a suit was pending for the claim, and she was attached to secure it. We have no doubt he knew of the claim. An affidavit was then made for



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a sequestration, showing that the bill of exchange was given for the use and benefit of the boat, on her last voyage, and claiming a privilege upon her for its payment. Perhaps the sequestration might have been set aside, because the plaintiff had resorted to the process of attachment; perhaps, because he had not shown that the money was furnished for the necessities of the boat, and that there may be an essential distinction, as contended, between what is furnished for the use and benefit and what is furnished for the necessities of the boat. Still it was never set aside until the court decreed, in a suit to which the defendant voluntarily made himself a party, that the plaintiff had a privilege upon the boat for his claim. From this decree an appeal was never taken. The debt now claimed is therefore due from the boat, as decreed by judgment. The defendant and *Price* purchased her, while a suit was pending to enforce it by attachment. Sequestration having then been resorted to in the same suit, they did not apply to set it aside as unlawfully issued, but gave bond *in solido* to produce the boat and subject her to execution, or to satisfy the judgment that has been rendered, and which is no longer appealable.

They have not produced the boat, and the execution is returned unsatisfied. The bond sued upon, by its terms, obliges the defendant to satisfy the judgment. To that effect he has been condemned by the district court, and we cannot say that substantial justice has not been done.

The judgment is affirmed, with costs in both courts.

CAMPBELL AND RICKARBY v. ALFRED PENN. BRADLEY,  
WILSON & Co., Intervenor.

*B., W. & Co.*, on the third of June, sold cotton to one *S.*, through a broker; but being fearful that the purchase money would not be paid, instead of giving an order for the cotton, in favor of the purchaser, on the proprietor of the press where it was on storage, they gave the order in favor of the broker. On the 5th of June, *S.*, the purchaser, obtained from *C.* and *R.* an advance on the cotton, and on the 7th of June, a further advance from the same parties. On the 6th of June, *S.* ordered the broker to transfer the cotton on the books of the press, to *C.* and *R.*, which was done by making an entry: "From *B., W. & Co.*, to *C., R. & Co.*" A part of the cotton had been weighed; the balance had not passed the scales. *S.* absconded, and *B., W. & Co.* refused to deliver the cotton. It was held, that the cotton which had been weighed, was liable for the advances. That which had not been weighed, was not liable. For, although it was wholly delivered by *B., W. & Co.* to the broker for the purpose of being delivered to their vendee, yet it was only partly delivered by the broker, to the latter.

The agreement amounts to the sale between the parties; the delivery completes it as to third persons.

The delivery of part of a divisible thing, is a delivery of that part alone, and not of the whole. The actual delivery of the whole, in block, completes the sale, even as to third persons, though the article is not counted, weighed or measured.

The secret instructions of a party to his agent, will not qualify the apparent absolute control and dominion with which he has thought proper to invest him. *Slidell, J.*

Where one of several parties must suffer, the loss should fall on that party who, by his imprudent confidence, has enabled the wrong-doer to get credit with innocent third persons, to which, upon the true, but hidden state of facts, he would not be entitled. *Slidell, J.*

Although the advance be not simultaneous with the possession, the privilege attaches as soon as possession is acquired, in pursuance of the antecedent promise, and is effective when adverse rights have not in the mean time been acquired. *Slidell, J.*

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**A**PPPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Hanton and Bradford, and Wolfe and Singleton*, for plaintiffs. *Benjamin and Micou*, for *Bradley, Wilson & Co.* By the court :

**PRESTON, J.** This is one of the great number of cases, in which the buyers and sellers of the vast products in our market, are defrauded by fraudulent speculators, and in which one or the other, or both, must suffer.

It is clearly established by the evidence, that *Bradley, Wilson & Co.*, on the 3d of June, 1851, through the instrumentality of *N. B. Keene*, a cotton broker, sold to one *Simpson*, 734 bales of cotton. The cotton was on storage, in a press, and on the same day they gave the following order, to the keeper of the press : "*A. Penn, Esq.*, Union Press, will please deliver to *N. B. Keene*, seven hundred and thirty-eight bales of cotton.

**BRADLEY, WILSON & Co."**

There is kept in the cotton presses a book, called the "black book." When cotton is sold through the intervention of a broker, it is entered and described in the columns of this book, and the broker heads it, "From A. B., seller, to C. D., buyer." It corresponds with a custom in London, for the broker to give to the buyer a note of the sale, called "a sold note," and to the seller a like note, called "a bought note." In this case, on the day of sale, *Keene* entered the cotton, with its marks, in the black book, but without a heading, as it would seem, from a knowledge that *Simpson* was in the habit of consigning his purchases for advances, and as a means of insuring payment.

On the 5th of June, *Simpson* obtained, from *Campbell* and *Rickarby*, an advance of \$14,000 on the cotton; and, on the 7th of June, a further advance of ten thousand dollars.

On the 6th of June, 1851, while these advances were being made, *Keene*, by the order of *Simpson*, transferred the cotton, by heading the entry in the black book, "From *Bradley, Wilson & Co.* to *Campbell, Rickarby & Co.*," and signed it. On the same day, he signed and gave an order to the press, in these words : "Union Press will please compress, and send on board the ship *Epaminondas*, the undermentioned cotton, as entered on the black book," describing 611 bales; and, on the 7th of June, gave a like order, to compress and send a hundred bales on board the ship *Sallie Fearn*. The orders were delivered to *Campbell* and *Rickarby*, as appears by their endorsements, to send the cotton on board as soon as possible.

On the 7th of June, *Simpson* absconded, without paying for the cotton. Four hundred and sixty bales had been actually weighed, and partly shipped on board the ship *Epaminondas*. The balance of the cotton had not passed the scales, and *Bradley, Wilson & Co.* stopped the further weighing, and claimed the whole of the cotton. *Campbell* and *Rickarby* sequestered and claimed the whole, as transferred to them by *Simpson*, for their advance of twenty-four thousand dollars.

The pretensions of the plaintiffs, amount to a claim for advances upon cotton, consigned to their order by the owner; those of *Bradley, Wilson & Co.*, to a recision of the sale of the cotton to *Simpson*, for non-payment of the price.

There is no want of good faith in these transactions, on the part of either the plaintiffs or intervenors. One or the other must suffer, by the frauds of an unfaithful cotton speculator. The immense losses to honest merchants, from like causes, have not taught them so to arrange with each other, that, in cash sales, delivery and payment should be simultaneous.

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The whole controversy in this case, as in all those of like character that have gone before, is as to the delivery of the cotton. The rule of law is unbending. The agreement, amounts to the sale between the parties; the delivery, completes it as to third persons. *Parker v. Starkweather*, 7 U. S. 483. *Erwin, McLaughlin & Co. v. Torrey*. *Laughlin v. Ganah*, 11 R. R. 140.

It is fully established by the evidence, that *Bradley, Wilson & Co.* sold the cotton to *Simpson*, and that the latter consigned it to the order of *Campbell* and *Rickarby*, who made the advances on the consignment. If the advance was made upon cotton actually delivered to the consignees, their privilege for the advance takes precedence of the vendors' lien. Did, then, the vendors deliver the cotton to *Simpson*, and he to his consignees, are the questions to be solved.

In considering the question of delivery, the district judge has made an all-important observation, that must be carefully borne in mind. The case is one of a double delivery, from vendor to vendee, and from vendee to the consignee. It took place, however, through the agency of the same person, the broker, who, in addition to his appropriate duty of making the sale, was employed by the parties to make deliveries. *Bradley, Wilson & Co.*, on account of a distrust of *Simpson*, charged *Keene*, the broker, with their delivery to him, and *Simpson* directed the same *Keene* to make his delivery to *Campbell* and *Rickarby*. For the order of *Bradley, Wilson & Co.*, to *Penn*, was to deliver the cotton to *Keene*. This was not, as contended, an order to deliver it to *Simpson*; but, as proved, was purposely intended to be otherwise; and, in fact, the cotton never was transferred on the black book to *Simpson*.

If *Bradley, Wilson & Co.* had themselves, or by their agent, placed the whole of the cotton in the possession of their vendee, though only symbolically on the black book of the cotton press, it seems so well established, by the usages of trade, that this would have been a delivery, that we could not resist, however much disposed, to favor real, rather than fictitious transactions. But, as they took the precaution to place it in the name of their agent, for the very purpose of avoiding a constructive delivery to *Simpson*, they are entitled to the benefit of that precaution. Much less had *Keene* power, from *Bradley, Wilson & Co.*, to transfer the cotton symbolically on the black book from them to *Campbell* and *Rickarby*. He had no power, from them, to deliver the cotton to, or consign it to, the order of *Campbell* and *Rickarby* at all. The latter made no advance to the factors, and do not pretend to have received the cotton from them. They made their advances to *Simpson*, and contend that they received the cotton from him. Then *Keene* placed it on the black book in their name, by *Simpson's* order, and not by the authority of *Bradley, Wilson & Co.* So that *Simpson* made a symbolical delivery, on the black book, to his consignees, before he had obtained a symbolical delivery on the same book himself, from his vendors.

The case is made plainer, by supposing two agents, one for the vendor, and one for the vendee. The agent of the vendor had power to place the cotton in the name of the vendee, on the black book, but did not do so. The agent of the vendee made a transfer on the black book, from the vendor to the consignees of the vendee, but had no power from the vendors to do so, and therefore the consignees derived no title from the transfer.

We, therefore, regard the transfer on the black book, from *Bradley, Wilson & Co.* to *Campbell* and *Rickarby*, as made without authority, and divesting the former of no rights, and as conveying none from them to the latter. In fact, it

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implies what is not true, that *Bradley, Wilson & Co.* sold, or transferred, the cotton to them, whereas, they had no transaction whatsoever with them.

It is strenuously contended, that the order of *Bradley, Wilson & Co.*, to deliver the cotton to *Keene*, was a delivery to *Simpson*. It does not purport to be so; and, the fair inference, from *Keene's* testimony, is, that it was given to him to hold the cotton, subject to his order, and to place it so on the black book, to avoid an immediate delivery to *Simpson*; and, that this was done, after consultation with *Bradley, Wilson & Co.*, and on account of rumors that *Simpson* was buying cotton beyond his means. The possession of the broker, under these circumstances, was not, as contended, the possession of *Simpson*, but the possession of *Bradley, Wilson & Co.*

But *Keene* had power to deliver the cotton to *Simpson*, the vendee of *Bradley, Wilson & Co.* No other meaning can be attached to their order, to the press, to deliver the cotton to him. Now, he did cause to be weighed, by the weigher of *Bradley, Wilson & Co.*, to be passed through the scales, and to be delivered, four hundred and sixty bales of the cotton. To whom did he deliver it? that is, for whom was it passed through the scales?

Not for himself. He had possession of the whole, by the order of *Bradley, Wilson & Co.*; and, in fact, held it for them. It was not passed through the scales for *Campbell* and *Rickarby*. His principals had nothing to do with them. He weighed and passed it through the scales for *Simpson*, because his principals had sold it to him.

This process, it is fully proved, is an actual delivery to the vendee. It was so considered, by both *Keene* and *Simpson*; for the latter gave orders, through *Keene*, to the press, to deliver it for shipment, and it was partly shipped. All that which was weighed was, therefore, in the possession and at the risk of *Simpson*, as owner. It was no longer at the risk of his vendors. Under such circumstances, he obtained an advance from the merchants, to whose order he consigned it, which covers all that was found in his possession, when the further delivery was stopped by *Bradley, Wilson & Co.* They had the right to stop the further delivery to *Simpson*, because he failed to pay the price; and, he could deliver no more to *Campbell* and *Rickarby*, because no more was delivered to him.

We concur with the district court, in the opinion, that the delivery of part of a divisible thing, is a delivery of that part alone, and not of the whole: as illustrated by the early case of *Durnford v. Brooks*, 3 M. R. 222. So the actual delivery of the whole, in block, completes the sale, even as to third persons, though the article is not counted, weighed, or measured, as decided in the case of *Morgan v. Shift*.

The cotton was, therefore, wholly delivered by *Bradley, Wilson & Co.* to the broker, for the purpose of being delivered to their vendee, but only partly delivered by the broker to the latter.

It was the misfortune of *Campbell* and *Rickarby*, that they advanced on a symbolical delivery by *Simpson*, through *Keene* it is true, of that which had not been symbolically, much less actually, delivered to him. It is the misfortune of *Bradley, Wilson & Co.*, that their agent, in pursuance of power given to him, actually delivered to *Simpson* 460 bales of cotton, sold by them without receiving the price. By putting the property into the possession of the vendee, the vendor enabled him to commit a fraud, by obtaining the advance without paying the price; and equity obliges him to bear the loss, rather than the merchants

who, in good faith, made the advance to the owner, and actual possessor, of the 460 bales of cotton. *Russell v. Favier*, 18 L. R. 589. *The Barings v. Corrie & Co.*, 2 Barn. and Ald. R. 137.

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Upon the whole, we are of opinion, that the judgment of the district court is correct, and affirm it, with costs.

SAYDELL, J., delivered the following separate opinion: *Bradley, Wilson & Co.* say, they had not given possession of the cotton to *Simpson*, their purchaser, because the weighing had not been completed, and they had not, in any manner, consented to the delivery; and they cite the 2433d article of the Civil Code, which says: "When goods, produce, or other articles, are not sold in a lump, but by weight, by tale, or measure, the sale is not perfect, inasmuch as the things so sold, are at the risk of the seller, until they be weighed, counted, or measured; but the buyer may require either the delivery of them, or damages, if any be for the same, in case of non-execution of the contract." In my opinion, the mutual rights and relations of *Bradley, W. & Co.*, and *Simpson*, are not the test of the rights of *Campbell* and *Rickarby*. They are third persons. What have *Bradley, Wilson & Co.* done, so far as plaintiffs are concerned? *B., W. & Co.* had cotton standing in their names, at *Penn's* press. Cotton so held, is subject to the order of the person who puts it there. *B., W. & Co.* give *Keene* a written order, addressed to *Penn*, as the keeper and proprietor of the press, directing him to deliver to *Keene* seven hundred and thirty-eight bales of cotton, mentioning the respective marks and numbers of the bales. As I understand the evidence, this order gave *Keene* the control of the cotton. The control of *Bradley, Wilson & Co.*, was divested. They ceased to be the holders of the cotton, as regarded third persons.

In this connection, the evidence of a proprietor of a cotton press in New Orleans, is very pertinent. He testifies, that he has known many instances, of cotton having been removed, on the order of the factor, without having been weighed. Cotton transferred by one factor to another, is seldom, or never weighed; and when shipped on planter's account, seldom, or never weighed; or if weighed in one press, and transferred to another, it would be delivered in the latter one, without being weighed.

*Keene*, thus invested with the control, transferred it, on the books of the press, to *Campbell, Rickarby & Co.*; and this he did at the request of *Simpson*, who had bought the cotton, and had got an advance from *Campbell* and *Rickarby*. But *B., W. & Co.* say, we did not intend *Keene* should part with the cotton, until *Simpson* paid us the price. If this was so, why did they give *Keene* an order, absolute in its terms? So far as the public was concerned, the order being absolute, rights acquired in good faith under it, cannot be disturbed. It is against well settled principles, to permit the secret instructions of a party to his agent, to qualify the apparent absolute control and dominion with which he has thought proper to invest him.

Again: *B., W. & Co.* have no equity, but the naked fact, that they have not received the price of what they sold. They not only clothed *Keene*, and through him, *Simpson*, with the *indicia* of ownership, but they did so, under circumstances which ought to have warned them of the danger of dealing with *Simpson*; for rumors, unfavorable to his credit, had reached their ears. *Keene* says, in his cross-examination by the plaintiffs, he had heard several reports, that *Simpson* was buying cotton beyond his means; that he had spoken to *Simpson* about these reports, and he had remarked to witness, that other parties were

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furnishing him with funds, and he had only a quarter interest in the shipment. He also says, he knows from his transactions with *Simpson*, that it was his habit to take advances from the houses through whom it was shipped. Again, he says, in consequence of cotton falling rapidly in Liverpool, he became apprehensive that the parties who were furnishing him with funds, might withdraw, or the party through whom he was getting advances, might fail. And again: witness consulted with *Bradley, Wilson & Co.*, on the subject of these rumors, prior to the 27th May; that is to say, several days before they sold him the cotton in question. It is certain, that *B., W. & Co.* knew *Simpson* was in questionable circumstances, and it is reasonable to infer from the evidence, that he knew he would raise money to pay them, by advances from others.

I do not think, however, that in point of fact, *B., W. & Co.* intended, as between themselves and *Keene*, to make *Keene* a mere agent for the delivery of their cotton, upon payment of the money by *Simpson*. On the contrary, in giving him the control, they seem to have left matters to his discretion. *Simpson* had made other purchases of *B., W. & Co.*, and *Keene* thus speaks of them, and of his own authority in these matters: "Witness told *Bradley, Wilson & Co.*, whenever he bought cotton of them for *Simpson*, that he was buying for *Simpson's* account." "In his purchases from *Bradley, Wilson & Co.* for account of *Simpson*, he had no special instructions from *Bradley, Wilson & Co.*, to enter the cotton to his own order, but was left to his own discretion in the matter. He had informed *Mr. Wilson* of the rumors he had heard, and the mode he had adopted. *Mr. Wilson* appeared satisfied, but gave him no instructions." *Simpson* bought 3600 bales of *B., W. & Co.* upon the 21st May; and in one case, 911 bales were allowed to go on ship-board, before *Simpson* was called upon for payment. He gave them a check on account of its price, on the 7th June. It had been sold on the 31st May; was transferred on the black book of the press on the 4th June, and was on ship-board when the check was given.

Looking to all the facts of this case, I cannot but consider the plaintiffs as persons, who have been induced to advance *Simpson* money, upon the faith of property, of which he had substantially the apparent control, and the possession which *Keene*, at his request, transferred to them. I say possession, since a symbolical possession is, for the purposes of commerce, an actual possession.

*B., W. & Co.* have, on this occasion, done as others are too much in the habit of doing. It is quite too common here, to repose confidence in the buyer, and let him get the control of the merchandise, before the price is paid. Such a course of business, should not receive judicial countenance; it enables speculators to go largely into the market, without real means; clothes them with an undeserved credit, and has been a prolific source of litigation and fraud. The consequence of such a course of business is, that occasionally, some one must suffer. In equity, the loss ought to fall upon the party who, by his imprudent confidence, has enabled the wrong-doer to get a credit with innocent third persons, to which, upon the true, but hidden state of facts, he would not be entitled.

It is said, however, that the advances were not, in legal contemplation, made on this specific cotton, but on the general credit of *Simpson*; or, as it was put in the oral argument, an advance on the promise of a consignment, is not an advance upon a consignment.

It is true, that a portion of the money was advanced, before a transfer of the cotton was made on the books of the press by *Keene* to *Campbell* and *Rickarby*, and the receipts of *Simpson* for the advances, do not recite the specific bales.

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One of them, that of June 5th, is "on account of shipment to Liverpool per Epaminondas;" and the other, that of June 7th, is simply, "on account." There is no doubt in my mind, however, that the first advance was made upon the faith of the expected consignment of the cotton in question; and when the second was made, the transfer on the book of the press had intervened. There was no notice of *B., W. & Co.'s* equity, nor any active intervention on their part, until after the whole amount of \$24,000 had been paid to *Simpson* by the plaintiffs. I concur in what is said by the district judge, that although the advance be not simultaneous with the possession, the privilege attaches as soon as possession is acquired, in pursuance of the antecedent promise, and is effective where adverse rights are not in the mean time acquired. The cases he cites sustain this view. *Turpin v. Reynolds*, 14 L. R. 473. *Powell v. Aikin*, 18 L. R. 328. Whatever doubts we might have on the subject, if the question were *res nova*, those cases have the force of precedents, and it would operate unjustly, to disturb them now. I am therefore of opinion, that the plaintiffs should have a privilege on the whole lot of cotton transferred to them on the books of the press.

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## JOHN DUNCAN et al. v THE STATE OF LOUISIANA.

The neglect of one officer of the State to do his duty, does not excuse the defalcation of another, or discharge his securities.

The law authorizing the auditor of the State to issue a warrant of distress, is not in violation of the Constitution.

**A**PPPEAL from the Third District Court of New Orleans, *Kennedy, J.* *Isaac Johnson*, Attorney General, for the State. By the court:

**PRESTON, J.** On the 28th of June, 1849, the auditor of public accounts issued a warrant of distress against the plaintiffs, as securities of *W. K. Stiles*, for a large amount of money due by him, as tax collector, for the Fourth Representative District of New Orleans. The plaintiffs enjoined the execution of the warrant on various grounds, two of which the district court sustained, and the State has appealed.

The warrant was issued under the 63d sec. of the act approved the 3d of May, 1847, "To provide a revenue for the support of the government of the State." It prescribes that, on the defalcation of the tax collector, the auditor of public accounts shall charge such delinquent accordingly, and immediately after such delinquency shall occur, issue a warrant of distress, which shall have the force and effect of a writ of *feri facias* against such delinquent and his securities, directed to the sheriff of the parish where such delinquent may reside, or where his securities reside, or where property belonging to either may be. The warrant enjoined was issued against the securities alone. The court held, that it was illegal, because not issued against the defaulter as well as the securities.

But the warrant itself shows, that one had been previously issued against *Stiles*; that a small sum had been made, and that, as to the balance, no property could be found to satisfy it. The 4th sec. of the act approved the 24th of April, 1847, relative to the bonds of tax collectors and other public officers, prohibited the sale of the property of the securities before that of the principal was dis-

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cused. This having been done by the previous execution, it was useless to issue a second against him.

In the next place, the 1st sec. of an act approved the 16th of March, 1848, required the tax collectors, in the parishes of Orleans and Jefferson, within the first five days of each and every month, to have their respective accounts audited and settled, for all taxes collected and monies received during the preceding month. The district court was of opinion, that as the law required a settlement every month, and that every time a delinquency occurred, a warrant should issue, no warrant could issue for any greater amount than one month's deficit.

We held, in the case of the *State v. Hardesty et al.*, securities of —, that the neglect of one officer of the State to do his duty, could not excuse the defalcation of another, or discharge his securities, and cited the highest authorities in support of the decision. We adhere to the opinion, without recapitulating the reasons.

And, for the reasons given in that opinion, if *Stiles* failed to take the oath required by the Constitution and laws from public officers, although it is not shown, or, if the auditor failed to advertise his defalcations, as required by the 35th sec. of the act to establish and regulate the treasury department, these omissions would not release the securities.

It is alleged, as a ground of injunction, that the collector was not entitled to collect the taxes upon trades, professions, licenses, &c. ; and that the securities are not, therefore, liable for his defalcation as to these taxes. But the law clearly contemplates, that the collector should collect all State taxes ; and the 44th sec. of the act provides, that he shall give bond for all taxes levied for State purposes.

The bond was not approved and accepted by the proper authorities on the 1st of May, 1848, as required by the statute, and, on that account, the securities allege that they are not bound. But, their principal made application for a *mandamus* to the Fifth District Court of New Orleans ; and that tribunal, after hearing the attorney general, determined that the bond was sufficient, and ordered the Recorder and Finance Committee of the First Municipality to approve the bond, and give him the certificate and documents necessary, to enable him to enter upon the duties of his office, which was done. The bond thus adjudged to be sufficient, and accepted, is not a nullity, but binds the parties.

It is contended by the securities, that the law authorizing the auditor of the State to issue a warrant of distress, is a violation of the Constitution, because it is the exercise of judicial power, by an executive officer of the government. We lately held the contrary, in the case of *Bordelon v. The New Orleans Towboat Company*, 7 Ann. To the reasons and authorities cited, in support of that opinion, we refer, as conclusive in this case.

The judgment of the district court is reversed ; and it is decreed, that the injunction be dissolved, and the appellees condemned to pay the costs in both courts.



## STATE v. SARAH CONNOR, f. w. c.

The competency of a witness to testify, is restored when he has suffered the penalty of the crime of which he has been convicted.

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**A** PPEAL from the First District Court of New Orleans, *Larue, J. Isaac Johnson*, Attorney General, for the State. *Henderson and Field*, for the accused. By the court:

**PRESTON, J.** The appellant was indicted for perjury, convicted and sentenced. She has taken an appeal from the judgment rendered against her. The only ground of error assigned is, that the district court erred in admitting the evidence of one *Cammeyer*, who had been convicted of swindling. He was convicted in 1841; was sentenced to one year's imprisonment, at hard labor, and, after suffering the punishment inflicted upon him, was discharged. The judge of the district court considered the objection to the testimony of *Cammeyer*, as affecting his credibility rather than his competency, and permitted it to be given to the jury for what it was worth. His reasons, embodied in the bill of exceptions, are thus expressed: "It is true that the witness was convicted and sentenced; but it is also true that he served his term of punishment, thus restoring his competency if ever it was lost, however much his conviction may affect his credibility. The court has great doubt whether the conviction, for the offence of which the witness was accused, renders him incompetent at all, inasmuch as our law has annexed incompetency to testify to the crimes of perjury and subornation of perjury alone, which would reasonably lead to the conclusion that the Legislature intended to include no others in the same class. If it intended to include others, it would have mentioned them. If all others were to be included, it would not have specified the two particular offences.

The maxim *inclusio unius, exclusio alterius est*, is too general, and subject to too many exceptions in its application, to govern the construction of criminal statutes. It is therefore urged, that *Cammeyer* was a witness wholly incompetent to testify, on account of his conviction and sentence to punishment for an infamous offence.

If this were an original question, to be decided upon general principles, we could see no reason why the testimony of a convict, under sentence, should be excluded. Evidence is that which convinces the mind of the existence of a fact. The testimony of the basest of mankind may often be valuable in the investigation of truth. That of a convict, for an infamous crime, is excluded, on the ground that no credit should be given to what he proves. And yet, notwithstanding the stigma, much might be elicited from a convict, which would satisfy an intelligent and discriminating jury of facts which could not otherwise be proved. There is no doubt that a fact in itself improbable, supported by such testimony, would not, upon the strength of it, obtain credence. It is in itself entitled to little weight, and it cannot be presumed that a jury would give it more weight than it deserved, unless we suppose that by the mere fact of being sworn as jurors, and being bound to examine with care and weigh with caution all the evidence brought before them, would divest the persons of whom the jury was composed, of all that common sense and discrimination which charac-

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terizes each individual in the ordinary pursuits of life. Satan himself might be believed when his assertions were in themselves probable, and were corroborated by the testimony of others, though, if such assertions stood alone and were contrary to our general observation of the nature of things, they would obtain no credit.

The whole tendency of modern jurisprudence, as to evidence, is to lay every thing before a court and jury which may elicit truth, trusting to their wisdom and intelligence to give only the weight it deserves, to that which is subject to suspicion and objection. In conformity to this view, have been most of the modern decisions and statutes upon the subject of evidence. The interest of a person in a suit, or the character he bears, goes to his credit rather than to his competency. More than thirty years ago Mr. Chitty observed, in relation to the very subject before the court: "On principle, it would seem that in general the objection to a witness, on account of his having committed a crime, particularly if not perjury, ought rather to affect his credibility than his competency, for though a person may be proved on his own showing, or by other evidence, to have committed a crime, it does not follow that he can never afterwards feel the obligation of an oath." Vol. 1, ed. 1819, p. 490.

Still, under the known principle of the common law, we should not disapprove of the rejection of the testimony of a person laboring under a sentence of conviction, of a crime belonging to the class embraced under the terms *crimen falsi*, as incompetent, especially as our code, in civil cases, retains the principle "that the competent witness is not one of those whom the law deems infamous." But, for myself, I do not say that I would reverse a judgment, in a criminal case, because such testimony was admitted, with all due caution, by the court; that it was liable to every unfavorable presumption arising from the want of credit on the part of the witness. The reason of the rules established in early times, when juries were ignorant and illiterate, which excluded much evidence from their consideration, ceases to have much force now that they are greatly improved in their composition, by learning and intelligence, and therefore there is much reason for the relaxation of the rules themselves.

It is not necessary to say more in this case, in relation to evidence objected to, on account of the infamy of witnesses generally, because, if the opinion of the district court, that the competency of the witness was restored by suffering the punishment to which he was sentenced, the subject we have alluded to, rather than fully discussed, becomes unimportant.

Whoever reads the section of Starkie, Phillips, Chitty, or any other elementary writer on evidence, in relation to the restoration of the competency, as witnesses, of persons who had been rendered incompetent by reason of crimes; by being admitted to the benefit of clergy, or undergoing a punishment equal to clerical purgation, by pardon, by the reversal of the judgment or other means, will see that there was no reason or consistency in the common law on the subject, as modified by the statutes of England, prior to the year 1805, when we adopted the rules of the common law as to evidence in criminal cases.

All the learning in relation to the restoration of competency, after conviction of an offence which admitted of the benefit of clergy, by purgation before the ordinary, it is of course out of the question to consider. And yet all criminals who could read, and for almost all crimes, were entitled to the benefit of clergy. This description embraces almost all criminals who are brought before our courts, in modern times almost all being taught to read. They might therefore be restored to competency by purgation, the process of which, an author

observes, almost always involved perjury on behalf of both the criminal and his compurgators. By perjury and subornation of perjury, therefore, they could render themselves competent to testify.

By a statute of Elizabeth, the convict could be restored to competency by being burnt in the hand. Thus, an infamous mark of his infamy removed it.

As to pardons, the king could have the testimony of convicts when he wanted it, and excluded their testimony, by refusing his pardon, when it did not suit the purposes of his prosecution. And Phillips and Amos observe in their *Treatise on Evidence*, "It has happened that, for the purpose of a single prosecution, no less than five convicts have been pardoned, whereas if such evidence could be used without a pardon, it would be more free from suspicion, and the ends of justice would be more effectually attained," p. 20.

Even in the United States it has been held, that if the witness was convicted in the State where his testimony is offered, the conviction renders him incompetent; but if in a sister State, the conviction does not affect his competency. Such unreasonable and inconsistent, we might almost say absurd, results, must flow from an erroneous source. We have, therefore, examined with as much care as the remainder of the term would admit, some of the elementary writers, and also decisions of the English courts upon the question of the means by which a person rendered incompetent as a witness, by reason of conviction and sentence for an infamous crime, may have his competency restored. We find much confusion in the decisions, and in the reasoning upon the subject; distinctions, are made where no difference really exists; and, cases falling under the same general principles, have been decided in contradiction to each other. The law was unsettled by the courts, except so far as all agreed, that a pardon restored the person in such manner as to make him a competent witness. Now, this discharge from the punishment, could no more change the character of the convict, than his sufferance of the punishment deemed adequate to his crime.

In this condition of uncertainty as to the law, the 9th statute of George IV, chap. 32, was passed. This statute does not pretend to alter or amend the common law. It was passed because, in its own words, it was deemed expedient to remove all doubts respecting the civil rights of persons convicted of felonies, not capital, who have undergone the punishment to which they have been adjudged. It must, therefore, be regarded as an exposition of the common law, by the highest authority; and it makes the suffering of the penalty equally efficacious in restoring competency, with the pardon of the crown. We think, therefore, it was the common law of England, as modified by statute in 1805, that the suffering of the punishment of crime restored the convict to his civil rights.

The humane principle must prevail in our criminal code. Our statutes prescribe penalties, which, being suffered, no other can be inflicted. And yet it would be the greatest possible additional punishment to subject a man, who had committed an offence and suffered the penalty, to the still further and great and cruel punishment of not being able, effectually, to complain when robbed of his property, deprived of his liberty, or his life in danger, because neither his oath or testimony would be taken to secure protection or redress. He should be permitted to say, I have expiated my offence by suffering all the law imposed upon me for my correction and an example to others; I should not be subjected to still greater punishment.

We are of opinion that there is no error in the judgment of the district court. It is affirmed, with costs.

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**EUSTIS, C. J.** The time allowed for the consideration of this cause, has not enabled me to examine all the views presented in the opinion of Mr. Justice Preston, but I am satisfied with the correctness of his conclusion as to the admissibility of the testimony of *Cannmeyer*, and concur in the affirmance of the judgment.

**ROST, J.**, concurred with the Chief Justice.

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### THE STATE v. ROGER.

The prisoner applied to the Supreme Court for a writ of *habeas corpus*, on the ground that there was no prospect whatever of having his appeal tried during the present term of the court, or earlier than the November term thereof. The court directed an immediate trial, and held, that writs of *habeas corpus* are undoubtedly matters of right; but courts and judges are bound to do, in relation to them, what is right between the prisoner and the public. The prisoner ought not to be bailed, on the ground that he cannot have an immediate trial, when the court is ready and willing to afford him that remedy.

The idea, that where a writ of *habeas corpus* is issued, there is an abstract right to immediate action upon it, without regard to circumstances, is wholly untenable.

The Supreme Court will, if possible, avoid coming in conflict with the district courts, by writs immediately directed to them to perform their duties.

When a judge delivers his opinion to the jury, on facts, it ought to be given as a mere opinion, and not as dictation; the jury should be left to understand clearly, that they are to decide the fact on their own view of the evidence, and that the judge interposes his opinion to aid them in the conscientious discharge of their responsible duties."

**A** PPEAL from the First District Court of New Orleans, *Buchanan, J. Isaac Johnson*, Attorney General, for the State. By the court: (*Stidell, J.*, absent.)

**PRESTON, J.** The prisoner was accused of murder, convicted of manslaughter, and took an appeal, which was made returnable to this court on Monday, the 28th of this month.

On the 25th of the month, he presented a petition for a writ of *habeas corpus*, for the purpose of being bailed. His application was based mainly on the ground stated in his petition, that "he is informed, and believes, that there is no prospect whatever of having his appeal tried during the present term of the court, or earlier than the November term thereof."

This court, being in session, and criminal business being entitled to preference over all other business, announced their readiness to hear the cause, directed it to be fixed for trial on the return day, and that the attorney general and counsel for the prisoner should be notified, as the trial of the case would supercede the main ground upon which the application to be bailed was based.

Although bound to grant a writ of *habeas corpus* to bail, even after conviction, as decided by this court in *Longworth's* case, yet we exercise the power, as intimated in that case, with reluctance, because, in doing so, we are obliged to hold a law of the General Assembly to be unconstitutional; because this court was divided in opinion; and because the district court holds a contrary opinion; and, because we are all sensible of the evils to which the exercise of the power may lead. It is our duty, therefore, to avoid the exercise of the power, if it can be done consistently with the rights of the applicants. We thought it could, in this case, by affording him an immediate trial, which we directed.

\*See an Act "To restrict the charge of the judge, in every criminal case, to an opinion on the law." Acts 1853, p. 249.

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The counsel of the accused appeared on the day assigned for the trial, and insisted on his right to be bailed, uncontrolled by any circumstances whatsoever. Writs of *habeas corpus* are undoubtedly matters of right; but courts and judges are bound to do, in relation to them, what is right between the prisoner and the public. The prisoner ought not to be bailed, on the ground that he cannot have an immediate trial, when the court is ready and willing to afford him that remedy. The State, the appellee, was ready; and the appellant is always presumed to be ready, until he makes the contrary appear in a legal manner.

The idea, that when a writ of *habeas corpus* is issued, there is an abstract right to immediate action upon it, without regard to any circumstances, is wholly untenable. It will be seen in 3 Burrow's Reports, that certain prisoners in England obtained a writ of *habeas corpus*, on the ground, that they had been illegally arrested. It was rendered probable, on the return of the writ, that they were convicts and fugitives from justice. The court, instead of releasing them, ordered a trial, to ascertain whether they were convicted felons or not, and having identified them as such, ordered them to be executed, under their former sentence, instead of being released, because of their subsequent illegal arrest. So that proceedings, under this writ, must be such as the circumstances require. Substantial justice must be done between the applicant and the State.

An application was, some time since, made by the prisoner to this court, for a *mandamus* to the First District Court of New Orleans, in which he was tried, to sign a bill of exceptions, intended to show that the judge, in sentencing the prisoner, addressed him entirely in the French language, and used that language in passing the sentence on him; and yet, that the sentence was entered upon the minutes, in the English language, by the clerk. The object seemed to be to raise the objection, that no legal sentence had been passed upon the prisoner. The case had been tried under the direction of the judge of the Fifth District Court, and the sentence pronounced by him, in the absence of the judge of the First District Court, on account of sickness, and the latter had declined to sign the bill of exceptions. It does not appear that any objection had been made to the mode of passing sentence by the judge who presided, or application to him to sign a bill of exceptions.

This court declined issuing the writ of *mandamus*, but informed the counsel, through their clerk, indeed stated in open court, that the matter would be considered on the trial of the case, and, if deemed material, means would be afforded, if possible, to secure the accused the benefits of the facts alleged by him.

Taking it for granted, generally, that the district courts will perform their duties, we deem it wise to avoid, if possible, coming in conflict with them, by writs immediately directed to them, to perform their duties. We did not think there was any thing in the application of the accused which required the extraordinary interposition of this court, by a writ of *mandamus*. The English was the native language of the judge who tried and sentenced the prisoner. The native language of the prisoner was French. We have no doubt, admitting the facts stated in the application, that the judge used the French language in explaining to the accused the laws, under which he was about to pass sentence upon him, and the necessity of enforcing them by punishment, and passed sentence in the same language, for the advantage and satisfaction of the accused, and to afford him the best possible means of knowing and understanding the proceedings and final judgment against him. The clerk recorded the sentence in the English

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language, as he was bound to do by the Constitution of the State. It is known to this court, that the French and English languages are equally familiar to him, and if they were not, that there is a translator provided for the court. We have no doubt he recorded the sentence correctly, and there is not even a suggestion to the contrary. Besides, if there was any injury in the proceeding to the accused, the objection of his counsel should have been made, and the bill of exception taken, and efforts made to remedy it before the judge who tried the case, and at the time it occurred. But, we think, no injury was done to the accused; and, organized as this court is, loaded with business almost beyond the power of performance, it is indispensable to economise time, and to confine our labors to matters of substantial importance. We consider appeals allowed in criminal cases for the re-examination of substantial questions of law, which may have materially affected the decision of the case.

Nevertheless, we would have been glad to have heard the learned and talented counsel of the accused on this matter, as well as the bill of exceptions, and other questions raised in the record. But he did not deem it proper to afford the court the benefit of his counsel, in consequence of our determination to pass upon the case at this term, unless good cause was shown for a continuance. We do not consider the absence of one of his able counsel sufficient. Questions of law alone are to be examined here, and we concur fully in what was stated at the hearing, that the counsel present was as able to examine these questions as this court. The attorney general submitted the case, and we have been compelled to perform our duties to the State and public, to the best of our judgment, without that aid.

On the bill of exceptions, the Chief Justice has prepared the following opinion, in which we all concur :

EUSTIS, C. J. In the charge to the jury the judge stated that, in the court's opinion, an offence had been committed by the defendant *Roger*, but whether that offence was murder or manslaughter, the court declined to give any opinion; to which the defendant, by his counsel, excepted. Whereupon the court further stated, that it had summed up the evidence and given its opinion, but recognized the right in the jury to decide both upon the law and the evidence, and, of course, they were not bound by the opinion of the court with regard to either.

The result of our inquiries on the subject presented by this bill of exceptions is, that there is no fixed rule, on examining the extent to which a judge, in his charge to the jury, may express his opinion, in relation to the truth or weight of testimony. It is manifest, that if a judge abuses the discretion reposed in him, and not content with expressing his opinion, undertakes to dictate to the jury on questions of fact, the verdict will be set aside, and a new trial granted. And, when a judge delivers his opinion to the jury on facts, it ought to be given as a mere opinion and not as dictation, and the jury should be left to understand clearly that they are to decide the fact on their own view of the evidence, and that the judge interposes his opinion to aid them in the conscientious discharge of their responsible duties. Cases have occurred before us, in which we have found great difficulty in drawing the line prescribing the duty of the judge on questions of fact. See the cases of the *State v. Green*, and *State v. Chandler*. Chief Justice Parker, a judge of great learning and experience in criminal cases, thus speaks in the case of the *State v. Child*, 10 Mass. Rep.

But it will be objected that the judge may have said many things tending, to make the jury incline to one side or the other. This would raise the question,

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whether a judge may reason upon the facts; and, if he intimates to the jury his own opinion of the evidence, whether this shall be cause for setting aside the verdict. We know of no rule requiring the judge to conceal his opinion. He is to comment upon the evidence. Is he to do it by merely stating that one witness says this thing, and another says that? Has he not power to say, this evidence is weak, and that evidence is strong? For myself, when the evidence on one side is nearly balanced by counter evidence, I endeavor to leave it to the jury to decide which scale preponderates; but, if the evidence on one side is strong, compared with that of the other side, I think it my duty to make the jury comprehend that it is so. *Turman v. Howard*, 3 Marshall, 384. *Conner v. State*, 4 Yerger, 137. *Sneed v. Breath*, 1 Hawks, 300. *Gordon v. Taber*, 5 Vermont Rep., 183. *Burt v. Gwinn*, 4 Harr. and Johnson, 507. *Roper v. Stone*, Cooke, 490. *Matson v. Fry*, 1 Watts, 433. *Governor v. Shelby*, 2 Blackford, 26. *Slatter v. Latspan*, 2 Watts, 167. *Graham*, on new trials, 310, *et seq.*

There is nothing before us which induces the belief, that the judge attempted, unduly, to bias the jury, or that his estimate of the weight of evidence was not just; and, we find that he expressly recognizes the right of the jury, to judge for themselves, and to determine on the facts, without being bound by the opinion of the court.

The law presumes intelligence on the part of juries; and, any improper interference with their province, on the part of the judge, is more likely to make them find a verdict against his opinion, than in accordance with it.

Undoubtedly, the manner of instructing the jury, sometimes, has an undue influence on the verdict, but it results from an imperfection of the system.

We think, therefore, that there is nothing in this bill of exceptions, which should authorize us in setting aside the verdict.

In the motion for an arrest of judgment, it is stated that the indictment is defective. We have examined it with care, but are unable to discover essential defects.

There being, then, a good indictment, a verdict of a jury finding the prisoner guilty of manslaughter, and no cause shown in arrest of judgment, we are of opinion that the judgment of the district court, as spread on the record, should be affirmed; and, by reason of the premises, adjudge and decree, in consideration of the verdict, and of the second section of an act for the punishment of crimes and misdemeanors, and other supplementary acts, approved the 20th of March, 1818, that the said *Augustin V. Roger*, for his offence of manslaughter, as found by the verdict, be sentenced to ten years' hard labor in the State penitentiary, to commence the 22d of May, 1852, and to pay a fine of one thousand dollars, and the costs in both courts.

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| 47 | 512 |
| 47 | 522 |

**MENARD and VIGNEAUD v. J. B. SCUDDER, and NOLAN STEWART,**  
**Executor of McCALOP.**

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| 122 | 676 |

A safe rule of construction of a guaranty is, to give the instrument that effect, which shall best accord with the intentions of the parties, as manifested by the terms of the guaranty, taken in connection with the subject matter to which it relates;—neither enlarging the words beyond their natural import in favor of the creditor, nor restricting them in aid of the surety.

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From the nature and purposes of mercantile guaranties, and the circumstances under which they are usually prepared, it seems improper to subject them to the standard of critical nicety.

A letter in the following words—"I do recommend my friend, *Mr. J. B. Scudder*, of the parish of East Baton Rouge, a planter, and any funds that he may raise, or acceptances, in case he does not pay, I feel bound to pay. *James McCalop*"—contemplates a continuing guaranty.

In the case of a prospective and continuing guaranty, the creditor must not only show, that he advanced his money, or parted with his goods, on the faith of the letter of guaranty, but that he also seasonably notified the guarantor, that he accepted the guaranty, and intended to act upon its security. But express and formal notice, emanating directly from the creditor to the guarantor, is not indispensable. If the fact of acceptance is seasonably brought to the knowledge of the signer in any other way, and he acquiesces by silence, it is sufficient.

The death of the guarantor, without notice or knowledge of the fact on the part of the creditor, does not defeat the creditor's right to indemnity for advances made in good faith, after the event.

**A** PPEAL from the District Court of the parish of East Baton Rouge. This cause was tried by a jury, before *Burk, J. G. S. Lacey* and *T. G. and P. H. Morgan*, for the plaintiffs. *R. H. Marr, Cyrus Raliff*, and *J. M. Elam*, for defendants. By the court:

**SLIDELL, J.** In this action, the plaintiffs seek to recover from *Scudder*, and also from the succession of *McCalop*, by reason of a letter of guaranty signed by him, a sum of \$19,864 03½, being a balance, exhibited by an account annexed to the petition, arising from supplies furnished for the use of *Scudder's* plantation; monies advanced and expended for him at his request, upon accommodation acceptances, accommodation endorsements, orders, &c.

There was a verdict for the plaintiffs, against *McCalop's* estate, for the sum of \$15,738 03, and the executor has appealed.

The letter of guaranty, upon which the claim is made, is in these words: "Baton Rouge, December 4, 1849. I do recommend my friend, *Mr. J. B. Scudder*, of the parish of East Baton Rouge, a planter, and any funds that he may raise, or acceptances, in case he does not pay, I feel bound to pay. *James McCalop*."

There is no doubt, this instrument contains a proposed contract of guaranty. It is not a mere recommendation. With the recommendation, is cumulated the declaration: "any funds that he may raise, or acceptances, in case he does not pay, I feel bound to pay." The common sense of this declaration, is a promise to indemnify; a guaranty to those who might lend him money, or accept for him. The proposition that this instrument was a mere expression of a feeling of moral duty, and did not contemplate a legal obligation, is not worthy of serious consideration. As the letter was intended to hold out inducements to others, to part with their money, and was calculated to create a just appreciation of indemnity, good faith requires, that such expectations should be fulfilled; and a breach of good faith, in such case, to another's detriment, the law will not tolerate.

But a graver question is presented, when we inquire what is the extent of the legal responsibility contemplated by the writer. Was it intended as a limited, or as a continuing guaranty? Was it a guaranty, intended to attach only to such aid, by way of loan or acceptance, as should be given to *Scudder*, on the presentation of the letter, or was it intended to cover such transactions with him from time to time, as the necessities of the one, and the convenience of the other, might dictate?



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The solution of this question is not free from difficulty, and might, perhaps, be solved in either way, according as one might choose to adopt, in the extreme of the conflicting doctrines which are to be found in the adjudged cases. Some of the authorities advocate, in favor of the surety, a strict rule of construction, and seem to demand, that it should appear unequivocally, that it was the purpose of the guarantor, to guarantee the payment of debts contracted from time to time. See *Melville v. Hayden*, 3 Bar. and Ald., 593. Opinion of Best, J. *Cramer v. Higginson*, 1 Mason, 336. *Whitney v. Groot*, 24 Wendell, 84.

On the other hand, there are authorities which countenance the doctrine, that a large and liberal construction is to be given, in such cases, in favor of one claiming rights under such guaranty, and holding it to be the duty of the guarantor, to limit his guaranty expressly to a single dealing, if he would avoid a further responsibility. See *Mason v. Pritchard*, 12 East. 227. *Hargrave v. Smea*, 6 Brigham, 244. *Durand v. Presman*, 12 Wheaton, 518. *Lawrence v. McCalmont*, 2 Howard, 450. *Lee v. Dick*, 10 Peters, 493. Opinion of Lord Ellenborough, cited in Smith's Mercantile Law, 386.

The true doctrine, we are inclined to believe, lies between these extreme opinions; and we think it was very judiciously observed by *Dewey, J.*, in *Massey v. Raynor*, 22 Pick. 228, that a safe rule of construction would be, to give the instrument that effect, which shall best accord with the intentions of the parties, as manifested by the terms of the guaranty, taken in connection with the subject matter to which it relates, and neither enlarging the words beyond their natural import, in favor of the creditor, nor restricting them in aid of the surety. See also *Bell v. Bruen*, 1 Howard, 187.

In furtherance of this rule of construction, we would add, that for the nature and purposes of mercantile guaranties, and the circumstances under which they are usually prepared, it seems improper to subject them to the standard of critical nicety, which might, with more reason, be applied to instruments usually drawn by professional men. Mercantile guaranties are usually written by the guarantor himself, and are often brief in their language, and inartificial and loose in their form. And in such cases, a nice and technical construction, might rather confuse, than aid the mind, in its search for the true intentions of the writer. We should endeavor, if possible, to put ourselves in the condition of the parties, and so seek to ascertain, from the words used, what were the ideas which existed in the writer's mind, and which he desired to convey to the person, or class of persons, to whom the letter would probably be exhibited; and we should also consider, what effect he ought reasonably to expect the words used, would produce in the minds of such persons. See also Civil Code, arts. 1948, 1897.

Now, *McCalop* was a planter. His friend, *Scudder*, whom he recommends, was a planter. He so describes him in the letter. He may be reasonably supposed as having, in his mind, the usual course of business, and the usual wants of a planter; the usual mode in which persons, in that avocation, seek for pecuniary facilities, and in which merchants extend them. He desires to facilitate *Scudder* in getting commercial aid, and he gives him the letter for that purpose. The words are adapted to the purpose: I recommend him. His business is that of a planter. As such, he wants to raise money. He wants some one to aid him, by cash advances, or accommodation acceptances. If any one will assist him in this way, I will pay them if he does not. He does not say, I will guarantee a single loan, or a single acceptance; but he speaks in the plural: any funds he may raise, or acceptances.

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Considering the business of the person, whom he proposed to benefit, the nature of the business to be transacted, and the class of the community to whom it was reasonable to suppose the letter would be exhibited, we are led to the conclusion, that a continuing guaranty was contemplated by *McCalop*, and that it would be so understood by a Louisiana merchant.

We have looked, with much care, into the decided cases, and find the prevailing doctrine to be, that, in the case of a prospective and continuing guaranty, the creditor must not only show that he advanced his money, or parted with his goods, on the faith of the letter of guaranty, but that he also seasonably notified the guarantor that he accepted his guaranty, and intended to act upon its security. As the subject is one of much commercial importance, it is proper to refer to some of the principal cases which bear upon it.

In *Russell v. Clark's Executors*, 7 Cranch, 69, it appeared that *Clark* and *Nightingale*, of Providence, had written to *Russell* letters, introducing and recommending their friends, *Murray & Co.*, of New York, who had in contemplation purchases of merchandise in Charleston. Judge Marshall, in giving the opinion of the court, considered the letters as recommendatory merely, and not constituting a contract, by which *Clark* and *Nightingale* undertook to render themselves liable for the engagements of *Murray & Co.* to *Russell*; but, he observes, had it been such a contract, it would certainly have been the duty of the plaintiff, to have given immediate notice of the extent of his engagements.

In *Cremer v. Higginson*, 1 Mason, 340, which was the case of a letter of credit, specially addressed, Story, Justice, held that it was clearly the duty of the plaintiff to notify the defendants that reliance was placed on the guaranty.

In *Edmonston v. Drake and Mitchel*, which was the case of a letter of credit, specially addressed, Chief Justice Marshall observed: It would, indeed, be an extraordinary departure from that exactness and precision, which peculiarly distinguish commercial transactions, which is an important principle in the law and usage of merchants, if a merchant should act on a letter of this character, and hold the writer responsible, without giving notice to him that he had acted on it.

In the case of *Douglass v. Reynolds*, 7 Peters, 117, *Douglass*, and others, had addressed a letter to *Reynolds, Byrne & Co.*, in which they said, their friend, *Huring*, to assist him in business, might require *R., B. & Co.*'s aid, from time to time, either by acceptance or endorsement of his paper, or advances in cash. And they bound themselves to be responsible to *R., B. & Co.*, at any time, for a sum not exceeding \$8000. The court considered this a continuing guaranty, and held, that it was necessary, to entitle *R., B. & Co.* to recover on the letter, that they should prove, that notice had been given, in a reasonable time after the letter had been accepted by them, to the guarantors, that it had been accepted.

In *Lee v. Dick*, 10 Peters, 492, the question of necessity of notice of acceptance of the guaranty, arose under a letter addressed in Tennessee, by *Lee*, to *N. & J. Dick & Co.*, of New Orleans, in which they said, *Nightingale* and *Dexter* wish to draw on you at six or eight month's date. You will please accept their draft for \$2000, and I do hereby guarantee the punctual payment of it. The court observed, the question is, whether the plaintiffs were bound to give notice to the defendant, that they intended to accept, or had accepted and acted upon this guaranty. It is to be observed, that this guaranty was prospective; it looked to a draft thereafter to be drawn; and this question is put

at rest by the decision of this court. They cited *Russell v. Clark's Executors*, 7 Cranch, 91; and *Edmonston v. Drake and Mitchell*, 5 Peters, 624.

So, in *Adams v. Jones*, 12 Peters, 213, it was held, that upon a letter of guaranty, addressed to a particular person, or persons generally, for a future credit to be given to the party in whose behalf the guaranty is drawn, notice is necessary to be given to the guarantor, that the person crediting has accepted or acted upon the faith of the guaranty.

See also *Wilds v. Savage*, 1 Story, 32. *Backman v. Hale*, 17 Johnson, 140. *Bank of Illinois v. Sloo and Byrne*, 16 L. R. 542. *Cremer v. Higginson*, 1 Mason, 340. *Massey v. Raynor*, 22 Pickering, 228. *Norton v. Eastman*, 4 Greenleaf, 521.

In citing the foregoing authorities, we do not wish to be understood as adopting them in their entire scope. Some of the rules which they enunciate have been, in subsequent decisions, qualified or abandoned; but so far as they inculcate the necessity of notice of acceptance, in a case like the present, to which case we desire to confine our opinion, we believe they have commanded a frequent concurrence in American courts, and we do not doubt their correctness. For, where the letter of guaranty is addressed to the public at large, where it is prospective, and to attach upon future transactions, where it is unlimited in amount and indefinite in duration, and is by its nature subject to recall, it seems manifestly just that the guarantor should be entitled to notice of acceptance, within a reasonable time, from the person who undertakes to act upon its faith. Such notice is material and important for many reasons. It enables the guarantor to know in whose favor the guaranty has attached or is about to attach; to form an idea of the probable nature and extent of his liability; to appreciate the necessity of vigilance on his own part; to avail himself, when necessary, of the appropriate means in law and equity, to protect himself with regard to liabilities which may have accrued, and to arrest their future creation by a recall.

We have not overlooked the fact, that the late decisions in New York (see 24 Wendell, 35, 3 Comstock,) conflict with this opinion, but we think the weight of authority and argument presented by the cases cited, preponderates in its favor.

We come now to the inquiries, whether *McCalop* had reasonable notice of acceptance of the guaranty by the plaintiffs. And, upon this point, we premise that express and formal notice, emanating directly from the creditor to the guarantor, is not indispensable. If the fact of acceptance is seasonably brought to the knowledge of the signer, in any other way, and he acquiesces, by silence, it appears to us sufficient. C. C. 1805, 1812, &c. *Train v. Jones*, 11 Vermont, 444.

There is no express evidence of notice in the present case. It rests upon circumstantial evidence alone, and this branch of the cause is certainly not free from difficulty. It presents another instance of that looseness with which commercial business is conducted in this State; a looseness which is the fruitful parent of litigation, and a source of extreme embarrassment to our tribunals, who are often called upon to apply the principles of commercial law to transactions in which the actors have disregarded that method, exactness and forecast, which ought to distinguish commercial dealings.

It is contended by the plaintiffs, that notice may be inferred from the following circumstances, exhibited by the evidence, and which are thus stated and commented upon in the argument of their counsel:

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"I. From the fact that *Menard* and *Vignaud* had previously been the merchants of *Scudder*, *McCalop* could well presume, from that circumstance, that *Scudder* had given the letter to his old factors.

"II. From the circumstance that *M.* and *V.* were the accommodation acceptors and endorsers of the joint paper of *McCalop* and *Scudder*, given for the benefit of the letter.

"III. From the connection and intimacy which existed between *Scudder* and *McCalop*. The testimony proves that *Scudder* had married a relative of *McCalop*; that the latter had gratuitously raised a heavy mortgage, which he held upon the property of the former, and that *McCalop* had placed in the possession of *Scudder* an unlimited letter of credit; and, with these facts standing prominently forth, can we for a moment presume that *Scudder* did not frankly and promptly inform his friend and benefactor, in whose hands he placed the letter of credit? At least, is not this a question of fact, properly submitted to the jury? And the jurors having, by their verdict, found in our favor upon that question, can this court feel authorized to reverse the finding upon that point."

The facts thus generally stated, are certainly quite cogent, and they do not lose their force by a more minute and detailed examination. For example, it appears that on the 8th January, 1850, a few weeks posterior to the date of the letters of guaranty, *Scudder* drew, at Baton Rouge, two drafts to the order of and endorsed by *McCalop*, who was an accommodation endorser, at eleven and twelve months, for \$2000 and \$2500, upon *Menard* and *Vignaud*, which were accepted by them a day or two afterwards, for the accommodation of *Scudder*, and being thus accepted were put, by the acceptors, into the market in New Orleans and discounted. The proceeds of discount were put to the credit of *Scudder*, in account current, on the 11th January, 1850, and they were paid at maturity, to the holder, by the acceptor. Tested by technical rules, applied to the face of the instrument, and without the assistance of surrounding facts, this bill transaction would not aid the plaintiffs; but, considered with reference to the true relations of the parties to the bills, and the irregular but well known course of dealing between our factors and planters, by which the factor raises money for the planter, through his own accommodation acceptances of the planter's bills, these transactions become very significant, and can hardly be reconciled with any other hypothesis than that *McCalop* knew the purpose of the drafts, and that his guarantee had been or would be presently used to obtain for his friend the desired accommodation. Again, on the 8th February we find *Menard* and *Vignaud* endorsing and getting discounted in the New Orleans market, for the accommodation of *Scudder*, his note dated Baton Rouge, January 27, 1850, at twelve months, for \$4500, endorsed by *McCalop*, which was taken up, after protest, by the plaintiffs. On the 18th April, 1850, the plaintiffs again accepted a draft of *Scudder*, endorsed by *McCalop*, for \$5000, at four months. Other circumstances of like character are shown by the record, but it is unnecessary to state them in detail.

Now, the letter on its face indicates that *Scudder* was in need of accommodation. It was a letter given to be used for that purpose, and as the subsequent acts of *McCalop* connect him so palpably with the efforts of *Scudder* to obtain accommodation from the plaintiffs, and the defendants have not shown any facts which could have tended to create an idea in *McCalop*'s mind, that the letter of the 4th December had been used elsewhere, we are naturally led to the conclusion that he was well acquainted with the direction it had taken. The same circumstances, and the great intimacy between *McCalop* and *Scud-*

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der may account for the omission, on the part of the plaintiffs, to address him a formal letter of acceptance.

It is said the precise time when the letter came into the possession of the plaintiffs does not appear. It is undisputed that it was in their possession in the early part of April, 1850, after which period important advances were made; and the circumstances of the case point strongly to the inference that it was exhibited to them personally, after its date. That inference was drawn by the jury, and the defendant asks with a bad grace for a reversal of the verdict on that score, having opposed and succeeded in excluding (erroneously, we think,) testimony which would have given more precision to this matter.

Where a guaranty has been accepted, and the guarantor knows the facts, notice from time to time of the advances actually made, appears in general to be unnecessary. See *Wilds v. Savage*, 1 Story, 33.

It is said that although *McCalop* died on the 9th July, 1850, matters went on in the same way as before, until some months after his death, when the account terminates; and that advances after his death should be stricken from the account, so far as *McCalop's* estate is concerned. Upon inspection of the account we find there were some advances subsequent to 9th July on the one hand, and remittances on the other; and, perhaps, upon a different showing the subsequent remittances, there being no express appropriation at the time, might be applied, *quoad* the guarantor, to the antecedent indebtedness of *Scudder*, which would result in some reduction in the appellant's favor. But as the case stands, upon the evidence, we do not feel authorized to disturb the verdict.

A guaranty like the present, we understand, is countermandable by the guarantor so as to arrest his further liability after notice; and it may be that the death of the guarantor would operate a revocation after notice of the death, or knowledge of the fact brought home to the creditor. But so far as we may judge from the analogies of the law, the mere death, without notice or knowledge, ought not to defeat the creditor's indemnity for advances, made in good faith, after that event. See the article 3001 of the Civil Code as to acts done in good faith, by an agent, after the death of his principal. See also *Troplong Du Contrat de Societ *, No. 903. *Utilitatis porro reipublice maxime circa commerciorum libertatem versatur. Nihil autem est quod exercendis commerciis et propagandis tantopere prosit, quantum si publice et bon  fide contrahentes sciant se certo contrahere*, *Comm. de Favre* (L. 24, § 1, D. de Minoribus.) Cited by *Troplong*, note No. 903, *supra*.

The judgment of the district court is affirmed, with costs.

An application was made for a re-hearing, when the court determined to reconsider the case on some of the points, and made the following memorandum:

SLIDELL, J. Upon the principal matters embraced in this cause, the opinion of the court, as hitherto pronounced, remains unchanged. But we have concluded to reconsider so much of the case as concerns the alleged indebtedness of *McCalop*, accruing after his death. This reconsideration is allowed in consequence of the impression entertained by a portion of the court, that knowledge, by the plaintiffs, of *McCalop's* death, immediately, or soon after that event occurred, may be inferred from the evidence.

In the reconsideration of this branch of the cause, it will be proper for counsel to discuss certain questions of law, which it was not necessary, positively, to decide in the absence of proof of notice or knowledge of the death.

The attention of counsel is therefore invited to the following points, not excluding any others that may be deemed pertinent to the case so far as opened.

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I. Does the death of the writer of such a letter of guaranty operate an implied revocation as to future transactions?

II. If so, at what period does such revocation take effect? From the date of the death, or the date of notice to, or knowledge by the creditor?

III. Is the evidence in this cause sufficient to establish, with reasonable certainty, such notice or knowledge, and authorize a reversal of the verdict of the jury?

IV. If so, what application is to be made of subsequent remittances or payments?

V. Present statements of balance of account, according to the views of counsel, so as to enable this court to act definitively in the cause, if possible, and not remand.

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#### SAME CASE—ON A RE-HEARING.

By the court:

PRESTON, J. After very able and elaborate arguments in this case, we came to the conclusion, that the executor of *James McCalop* was liable to the plaintiffs, on his letter of credit in their possession, in favor of *John B. Scudder*, dated the 4th of December, 1849. We inferred a knowledge as to *McCalop* of its acceptance, from the testimony, the relations of the parties, their proximity of residence, and the intrinsic character of the plaintiffs' account against the defendants.

*McCalop* died on the 9th of July, 1850, but the account was continued until the 31st of January, 1851, and the balance to the last date is claimed. But the power of *Scudder* to raise, and of the plaintiffs to furnish funds, on the credit of *McCalop*, ceased as soon as his death was known to them.

From their relations, residence, the distinction of the deceased as a planter and landholder, his note as a citizen, and the evidence generally, we infer, that his death was known to the plaintiffs, immediately after it occurred.

The balance due at the death of *McCalop*, is all that the plaintiffs can claim from his executor; and all payments subsequent to that event, his executor has a right to impute on that balance, no imputation having been made by *Scudder*.

A cash balance existing against *Scudder*, when the letter of credit was given, cannot affect the result. It is extinguished; *Scudder* having acknowledged the plaintiffs' account, by which it was merged in account current.

The debit side of *Scudder's* account when *McCalop* died, amounted to \$43,099 83. The whole payments made by *Scudder* before suit, amounted to \$30,664 38. Leaving a balance due of \$12,435 45. Interest and commission, rejected, \$312 74. Leaving \$12,122 71. And to bring this indebtedness within the very terms of the letter of credit, we have no doubt, that the plaintiffs hold the following notes and acceptances of *Scudder*, given while it was in existence and payable after the death of *James McCalop*. The draft of *Scudder* in favor of *McCalop*, dated the 8th of January, 1850, and payable the 11th of December, 1850, for \$2000. The draft of *Scudder* in favor of *McCalop*, in like manner, accepted and paid by the plaintiffs, dated the 8th of January, 1850, and payable the 11th of January, 1851, for \$2500. The note of *Scudder*, endorsed by *McCalop*, dated the 27th of January, 1850, and paid the 30th of January, 1851, for \$4500. The joint note of *Scudder* and *McCalop*,

dated the 27th of May, 1850, and payable the 31st of January, 1851, for \$5500—\$14,500.

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And, we suppose, these with some smaller drafts, were the foundation of the verdict of the jury; but, that they failed to credit payments made by *Scudder* after *McCalop's* death.

They allowed too much, but erred on the other side, by not allowing interest as prayed for in the petition.

The judgment of the district court is reversed, and judgment rendered in favor of the plaintiffs, against *Nolan Stewart*, executor of *James McCalop*, for the sum of twelve thousand one hundred and twenty-two dollars and seventy-four cents, with interest from the judicial demand, and costs in the district court. The costs of appeal to be paid by the plaintiffs, appellees.

### SAMUEL T. WILLIAMSON v. ALEXANDER NORTON, Master, &c.

A slave, whose appearance and color gave no indication of African extraction, passed himself as a white person, and took passage on a steamer. After several days, the captain suspected his true condition, and delivered him to the civil authorities of Memphis, as a runaway. In an action, by the master, for damages, it was held that the captain was not liable.

**A**PPPEAL from the Second District Court of New Orleans, *Lea, J. Wolfe* and *Singleton*, for plaintiff. *R. M. Karney*, for defendant. By the court:

ROSE, J. I am of opinion, that there is no error in the amount allowed to the plaintiff in the judgment. The fact that the slave, carried away by the defendant, had taken his passage as a white man, and was suffered, without remark or objection from the passengers, to sit at the first table, and near the lady passengers, satisfied me, that the defendant might well have been deceived as to his color. The promptness with which he arrested him, and caused him to be confined in jail, at Memphis, on the mere suspicion that he was a slave, fully exonerates him from the intention of violating the act of 1840. I think, with our predecessors, that the presumption created by the act of 1840, only exists when the master himself finds his slave on board of the vessel; and is not applicable to cases in which the captain finds the slave, and takes the steps pointed out by that act to secure him. See *Winston v. Footer et al.*, 5 R. R. 114. In the case of *Buddy v. The Steamer Vanlear*, we intimated, that the fine, imposed by the act of 1840, should be inflicted after conviction in a criminal prosecution. See 6 Ann. 34.

While I acquit the defendant from all criminal intent, it cannot be denied that, in consequence of carrying away the plaintiff's slave, the latter suffered the damages allowed by the district court; and I am of opinion, that the allowance was properly made, under the prayer for general relief and the provisions of articles 2294 and 2295 of the code. But, for these damages, the privilege, allowed by the act of 1840, did not exist; and the sequestration should have been set aside, at the costs of the plaintiff. In this respect, the judgment must be amended. And, on the remainder of the case, the court being equally divided, the judgment of the district court must be affirmed.

It is therefore ordered and decreed, that the judgment of the court below be amended, and the sequestration sued out by the plaintiff set aside. It is

WILLIAMSON further ordered, that, with this amendment, the judgment be affirmed, the costs of the district court to be paid by the defendants, and those of this appeal and the sequestration, by the plaintiff.

EUSTIS, C. J., concurred.

SLIDELL, J., dissenting. I think there should have been judgment for the defendants. See *Hurst v. Wallace*, 5 L. R. 99; *Winsten v. Porter*, 5 R. R. 113; *Spalding v. Taylor*, 1 Ann. 195; and the testimony of *Underwood*, *Cole*, *Blanchard*, *Duval*, *Martin*, *Denning*, *Phillips*, respecting the color, hair, and general appearance of the slave. I do not think the testimony of the three last could be excluded, under the statute of 1840, it not being applicable to the case, for the reasons given in 5 R. R. 113.

PRESTON, J., concurred.

### SAME CASE—ON A RE-HEARING.

By the court:

PRESTON, J. We have again carefully reviewed the evidence in this case. The slave of the plaintiff, being well dressed and of a genteel deportment, took a cabin passage, on the steamboat *Western World*, going from New Orleans to the western country, crowded with passengers. His color was a shade lighter than a new saddle, with a clear skin, his hair dark, but straight. He sat at the first table, in the cabin, and near the ladies. His appearance did not indicate African extraction, but that of a person born in the South and exposed to the sun, a Mexican or Spaniard. No person suspected his negro blood, until, near Memphis, the steward of the boat expressed his suspicion. An *eclair cissement* was had, and the master of the boat took the responsibility of delivering him to the civil authorities at Memphis as, probably, a runaway slave. He was brought to New Orleans, and sold at auction. The auctioneer and another think the discovery of his African blood might have been easily made. All discoveries are easy after they are made. The passengers of a crowded boat did not make the discovery in traveling seven or eight hundred miles with him, although he sat generally near the head of the table—although, one of them says, he had the appearance of a modest unassuming gentleman; another represents him as freely mingling with society. Even after the discovery, many thought the master to blame in acting without more indications of color, or proof. We think he boldly incurred risks, for the benefit of an unknown owner.

The master and officers of a steamboat, crowded with freight and passengers, have too much to do to scrutinize minutely the hair, skin, and complexion, of every one on board; and, if they act with ordinary care, are excusable, even if they overlook that which requires, out of their peculiar line, minute inspection to ascertain.

With these views of the general character of the evidence, and referring to the authorities cited by Justice Slidell, in the original opinion, we think the judgment of the district court should be reversed.

It is decreed, that the judgment of the district court be reversed, and that there be judgment for the defendants, with costs in both courts.



## SUCCESSION OF FRANKLIN—ADELICIA ACKLEN, and her minor child EMMA, v. J. W. FRANKLIN et al. trustees, &c.

Depositions will not be rejected, on the ground that the cross questions were not answered,—where the cross questions were irrelevant to the issue, and of such a character as would have justified the district judge in erasing them from the records of his court. *Rost, J.*

The domicile of origin continues until another is acquired, *animo et facto*. He who seeks to establish that another has changed his domicile, must prove it by express and positive evidence; so long as any reasonable doubt remains, the legal presumption is, that the domicile has not been changed. *Rost, J.*

The law which fixes the domicile of a person at the place where his principal establishment is situated, means the principal domestic establishment; not that where he may have the largest portion of his fortune. *Rost, J.*

Intention to reside, coupled with occasional residence of a few days in each year, is sufficient to continue the original domicile. *Rost, J.*

The testator, a citizen of Tennessee, conveyed immovable property, situated in Louisiana, to his brothers, forever, in trust; the revenues to be employed in establishing and maintaining an academy in Tennessee, as particularly set forth in the will. He directed also that, after the death of his brothers, (the trustees,) the trusts should be continued, and pass over forever in the heirs of his said brothers, to pass the estate; and that the magistrates of the county court of the county of Sumner and State of Tennessee, and their successors in office, should be thereafter the perpetual superintendents of the aforesaid seminary. *Held*: The testator's intention, in this case, was to create a perpetuity, and, as to Louisiana, a new tenure of property; that intention is a legal impossibility, and the disposition falls.

It is impossible to recognize trust estates in Louisiana, without letting in all the laws which regulate that peculiar tenure of property; and the Constitutional inhibition to the Legislature to adopt any system of foreign laws, by general reference, would be rendered nugatory, if courts of justice assumed the power to introduce those systems by piecemeal, in this insidious manner. *Rost, J.*

Under the hypothesis that the words, "in trust," in this case, should be reputed not written, the title must have vested in the original trustees in full ownership, and, if it did, the charge to preserve and return the property to other persons after them, would be such a substitution as would avoid the entire disposition. *Rost, J.*

When the words of the testamentary disposition are sufficient to vest a legal title in the legatee, and the intention of the testator to create such a title for his benefit, to the exclusion of the heirs at law, and of all other persons, is ascertained, then, in furtherance of that intention, any illegal or impossible condition the disposition may contain, is presumed to have been inserted inadvertently, and is reputed in law, not written; but, where the title, created by the will, as ascertained by the words used, and the intention of the testator, is a tenure of property which our laws do not recognize, the attempt to change the nature of it, and to convert it into a title, valid under our laws, would no longer be an interpretation of the will, but the making of a new will for the testator. *Rost, J.*

I put this case upon the principle, that, where the condition is of the essence of the title created by the bequest, and intended by the testator, so that the will cannot stand without it, if that will be one which the law does not recognize, courts of justice cannot replace it by another, and the disposition must fall. *Rost, J.*

The prohibition contained in art. 1477 C. C., has not exclusive reference to citizens of other countries; it applies to sovereign States or corporations: for corporations, legally ordained, are substituted for persons. *Rost, J.*

The prohibition to a citizen of Louisiana, to make donations *cousa mortis* in favor of citizens of other States, does not conflict with 2d sec. of the 4th art. of the Federal Constitution, guaranteeing to the citizen of each State all the privileges of the citizens of the several States. *Rost, J.*

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| 44  | 117  |
| 7   | 395  |
| 45  | 906  |
| 7   | 395  |
| 48  | 158  |
| 48  | 1308 |
| 49  | 1178 |
| 7   | 395  |
| 52  | 50   |
| 52  | 51   |
| 52  | 89   |
| 7   | 395  |
| 109 | 1097 |
| 7   | 395  |
| 110 | 77   |
| 7   | 395  |
| 112 | 700  |
| 7   | 395  |
| 119 | 281  |
| 119 | 283  |
| 7   | 395  |
| 123 | 1024 |

**SUCCESSION OF** Therefore, where a testator bequeathed immovable property situated in Louisiana, to  
**FRANKLIN.** trustees, to be held by them for the benefit of a charity in Tennessee, where the validity of

the bequest is disputed, the trustees should show that the laws of Tennessee do not prohibit similar dispositions from being made in favor of a citizen of Louisiana. *Rost, J.*

The trust, created by the testator, was not uncoupled with an interest; the trustees and their descendants, all had a direct interest in the bequest. The effect of such a bequest is not merely to create a perpetuity; it contains an indefinite series of prohibited substitutions. *Rost, J.*

A testament is a law, and the first duty of courts, in this as in other laws, is to ascertain the *mens legislatoris*; when it is once ascertained beyond reasonable doubt, it must be followed, and the disposition stands or falls, as the intention of the testator can, or cannot be carried into effect, consistently with the rules of law. *Rost, J.*

Powers given to testators by the code, are exceptions to the general law regulating the devolution of property; they are limited, both as to form and substance; and it is not enough to say, that perpetuities are not prohibited, it should be shown that they are authorized. *Rost, J.*

A trust, as attempted to be created by this will, is a right in equity, to the beneficial enjoyment of lands and slaves, of which the legal title is in another person. I am not aware of any trust estate created in Louisiana, which has been recognized as a legal tenure adversely to third persons having an interest. *Eustis, C. J.*

The framers of our code never contemplated to abolish naked trusts, uncoupled with an interest, which were to be executed immediately. *Eustis, C. J.*

A man has no more power to create new, or prohibited modes, of conveying property by will, than he has by sale, or by donation *inter vivos*. Between parties, they may hold their property, by any tenure or terms they please; but, as to the establishment of titles affecting the property itself, there is no power in man, out of the law; nor has society any interest in attempting to carry into effect the wishes of the dead, to the disturbance of the rules of public order and policy which regulate the living. *Eustis, C. J.*

A marriage contracted out of the State, between persons who afterwards *come here to live*, (*s'y établir*), is also subjected to the community of acquets, with respect to such property as is acquired after their arrival. C. C. art. 2370. For the true sense of the language of the code, the inquiry should be, did *Franklin* and his wife *live* in Louisiana? Were they established here? By the words of the code, we are to understand the *domestic* domicile, the true and permanent home; that domestic hearth, where the husband and wife have surrounded themselves, and their offspring, with the comforts of domestic life; and from which, when he and his wife occasionally depart, for the purposes of business, or pleasure, they do so with the intention to return. *Slidell, J.*

Where there is doubt on the question of domicile, the original home is to be considered the true home. *Slidell, J.*

The bequest, by *Franklin*, to his brothers and their heirs, forever, in trust, of certain property, the revenues to be employed in establishing and maintaining an academy, in Tennessee, to be superintended by the magistrates of Sumner county, and their successors in office, &c. &c., establishes a tenure of property unknown to the laws of Louisiana, highly inconsistent with their spirit, creating an entail, and substantially involving, in a very aggravated form, a prohibited *fidei commissum* and substitution. *Slidell, J.*

The act of 1818, added facilities for the acquisition of a residence in this State, but it did not repeal the law of 1816, on the same subject. *Preston, J., dissenting.*

A declaration, made in the manner pointed out by law, is conclusive of the will and intention to become a citizen and resident of Louisiana. *Preston, J., dissenting.*

Special legacies are not to be paid out of the portion of the forced heirs; and, where a sum is given by the husband to the wife, in lieu of her interest in his succession, it is a charge upon his general estate. *Preston, J., dissenting.*

A testator may make every disposition of his property by donations *mortis causa*, which he could make by donations *inter vivos*. Unless the law prohibits a testamentary disposition, the testator may make it, if it do not violate some rule of morality or duty. *Preston, J., dissenting.*

There is, in our code, but a single restriction upon dispositions in favor of a stranger, and that is, where the laws of his country prohibit similar dispositions from being made, in favor of a citizen of this State. Art. 1477. There is no prohibition, of a disposition in favor of a foreign State, or corporation created by it. *Preston, J., dissenting.*

If article 1477 of our code, was intended, by way of retaliation, to prohibit our citizens from making donations *mortis causa*, to citizens of Tennessee, both laws would be void, as conflicting with the 3d section of the 4th article of the Constitution of the United States, guaranteeing to the citizens of each State, the privileges of citizens of the several States. **SUCCESSION OF FRANKLIN.**

*Preston, J., dissenting.*

Where a testator is desirous of becoming the founder of a charitable or educational institution, he does so on the implied condition, that the State will ratify his benevolent intentions. If the confirmation is withheld, the will is defeated; but, if granted, it operates like the accomplishment of all suspensive conditions, whether express or implied, and has a retroactive effect. *Preston, J., dissenting.*

Legacies, in favor of corporations, do not lapse, by the incapacity of the corporation to receive, at the death of the testator; the incapacity may be removed, retroactively, by the sovereign. *Preston, J., dissenting.*

The term, substitution, embraces the ownership, and not the administration of property. It implies, that one should hold the property for another, during life, and transmit it to him at his death. It is very similar, in its effects, to the entail of the English law. To constitute a substitution, the donee must be charged to preserve the property until his death, and then return it to the substituted heir or legatee. *Franklin* did not give the third of his property to his brothers, under a charge to preserve and return it to their heirs. His brothers, and their heirs, were merely appointed to take charge of, and administer it, for the seminary of learning, in Tennessee. *Preston, J., dissenting.*

A *fidei commissum* is created, where property is given to one, for another, to vest in the latter, immediately, at a given period, or upon a condition. The will does not contain a *fidei commissum*, because the property was not given by *Franklin* to his brothers, for the literary institution, but was given to the institution itself; and, the title remained in the succession of *Franklin*, until the seminary was incorporated. *Preston, J., dissenting.*

Article 1507 of the Civil Code, when adopted in the code of 1808, was not intended to introduce new principles of law into Louisiana, but merely to recognize the existing law; and no other than substitutions, and *fidei commissae*, previously unlawful, were prohibited by it. *Preston, J., dissenting.*

Substitutions, which changed the order of descents, and fostered pride and laziness, and, abstracted property from commerce; and, *fidei commissae*, by which one held property for another, who was incapable of receiving, or for an unlawful purpose, which were prohibited by the law of Spain, in force in 1808, were the substitutions, and *fidei commissae*, which the juriconsults, who framed the code, declared *are*, and *remain*, prohibited. *Preston, J., dissenting.*

**A** PPEAL from the District Court of West Feliciana. *Stirling, J.*  
*W. W. King*, for plaintiffs.

*Benjamin and Micou*, for plaintiffs, maintained:—In all civilized countries, it has been found indispensable to check by legislation, the unlimited disposal of property by will. The passion for acquisition of property is so strong, the tenacity with which it is preserved is so great, the reluctance with which it is abandoned by its possessor, even when on the brink of the grave, is so unconquerable, that the propensity of mankind to continue their control over property, even after death, requires the restraint of the most vigorous legislation. In Louisiana, the policy of the State, on this subject, has been uniform: the enactment of the law-giver, and the jurisprudence of the courts, have concurred from the very origin of our State government, in vindicating and maintaining this policy. The grounds on which it rests, are perfectly familiar. It is against public policy, that any individual should be allowed to intervert the order of inheritance established by the general law, and to create a special or exceptional order for his own property. It is against public policy, that estates be tied up in perpetuity, be rendered inalienable or be in any manner withdrawn from commerce. It is against the public policy of the State, that the tenures of title by which property is held, be rendered complex, thereby giving rise to litigation, to difficulties and embarrassments, and to the long train of disastrous results, which ensue when the titles to property cease to be clear, simple, and intelligible to the ordinary understanding of mankind. It is against public policy, that the elements of the ownership of property be decomposed; that the legal title be vested in one, and the beneficiary interest in another, whereby it almost invariably occurs, that improvement is checked, waste lands remain uncultivated, and vacant lots continue unimproved and untenanted.

SUCCESSION OF  
FRANKLIN.

In all the changes that our judiciary has undergone, the jurisprudence of the State, on this subject, has been maintained by one unbroken series of decisions.

In the case of *Mathurin v. Livaudais*, 5 N. S. 302, Judge Porter, in delivering the opinion of the court, declared, that "our code abolishes substitutions and *fidei commissa*. The object of this change in our jurisprudence was, as it is well known, to prevent property from being tied up for a length of time in the hands of individuals and placed out of the reach of commerce."

In the *Heirs of Cole et al. v. Cole's Executors*, 7 N. S. 416, the same judge, again the organ of the court, observes, "It is necessary to check the power of the citizen over his property after his decease; for the strong desire in mankind to perpetuate their authority, over what they have acquired, would otherwise induce them to place it for a length of time, and forever, if they could, out of the reach of alienation."

In *Arnaud v. Tarbe et al.*, 4 L. R. 502, Judge Matthews declared, that "the policy of our law in prohibiting substitutions, is founded on reasons of public convenience and utility; to preserve the order of successions uniform, to prevent the confusion, difficulties and uncertainties of titles to property held under entails, and to leave it free for the purposes of commerce."

In *Harper v. Stansborough*, 2 Ann. 381, Eustis, C. J. says, "It is the attribute of every government, to establish and regulate such modification of the rights of property in things within its jurisdiction, as the public interest requires. Testamentary substitutions are prohibited in this State. The prohibition is established in the interest of public order and state policy. They have always been held null by our courts, the nullity being of that character which is absolute and irremediable." And again, "the modifications of the rights of property under our laws are few and easily understood, and answer all the purposes of reasonable use. It is incumbent on courts to maintain them in their simplicity."

In the case of the *Heirs of Henderson v. Ross*, 5 Ann. 441, Judge Slidell decided, "that an attempt by a testator to perpetuate his succession, is in violation of the policy of the law: that the spirit of the law, abolishing substitutions and *fidei commissa*, is to prevent property being tied up and out of the reach of commerce. That if such bequests be unlawful, *à fortiori*, is it unlawful to tie up property in the hands of executors and commissioners forever." And in *Roy v. Latiolas*, 5 Ann. 557, Judge Preston quotes, with high eulogy, and affirms the principles recognized and maintained by Judge Matthews, in *Arnaud v. Tarbe* already quoted.

If, after this rapid review of the decisions that are declaratory of the general principles which govern the subject, we refer to the positive legislation of the State, we find that the chapter of our code, which treats of such bequests, is entitled "of dispositions reprobated by law in donations *inter vivos* and *mortis causa*." There are but four articles in the chapter; they read thus: Art. 1506: In all dispositions *inter vivos* and *mortis causa*, impossible conditions, those which are contrary to law or to morals, are reputed not written. Art. 1507: Substitutions and *fidei commissa* are and remain prohibited. Every disposition by which the donee, the heir, or legatee is charged to preserve for, or return a thing to a third person, is null, even with regard to the donee, the instituted heir, or the legatee.

In consequence of this article, the trebellianic portion of the civil law, that is to say, the portion of the property of the testator, which the instituted heir had a right to retain when he was charged with a *fidei commissum* or a fiduciary bequest, is no longer a part of our law.

Article 1508: The disposition by which a third person is called to take the gift, the inheritance or the legacy, in case the donee, the heir, or the legatee does not take it, shall not be considered a substitution and shall be valid. Art. 1509: The same shall be observed as to the disposition *inter vivos* or *mortis causa*, by which the usufruct is given to one, and the naked property to another.

In connection with these articles, it may not be improper for us to call attention to the terms of one or two other articles of our code, declaratory of well known general principles, which will find constant application in the progress of the argument.

Article 9: The law is obligatory upon all inhabitants of the State, indiscriminately; the foreigner, whilst residing there, and his property, within its limits, are subject to it. Art. 12: Whatever is done in contravention of a prohibitory law, is void, although the nullity be not formally directed.

With these general principles kept constantly in view, as the lamps which are to guide our path, we now proceed to the examination and analysis of those provisions of *Franklin's* will, which, according to our view of the law, are null and void. SUCCESSION OF  
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The testator, after making a disposal in favor of his wife of certain revenues, &c., and bequeathing to his children that portion of his estate, which he was by law forbidden to dispose of, to their prejudice, makes the following devise:

"8th Item. I give and bequeath all my property, real and personal, of whatever kind or nature, that is situated in the States of Tennessee and Mississippi, or any other common law States, where trust estates can be created, together with my bank stocks and effects and credits, and an undivided one-third part of all my said property, movable and immovable, slaves, &c., that is situated, lying and being in said State of Louisiana, and also the rest and residue of my estate, wherever situated, in trust, to my two brothers, *James* and *William Franklin*, of Sumner county aforesaid, for the following purposes, to wit: the revenues arising from said property, bank stock, and such money, funds or credits due me, as may remain after the payment of the several devises and legacies, annuities, increase and ameliorations of my said plantations in Louisiana and other purposes as directed by this will, together with the revenues arising from my plantations in Tennessee and other property in Tennessee and Mississippi, and other common law States, together with the dividends of my bank stock, and interest on money and notes due me, and the revenues of the one-third of all my property, situated in the State of Louisiana, after the payment of said several devises, &c., to be laid out in building, proper and suitable edifices on my said Fairview plantation, in the county of Sumner and State of Tennessee, for an academy or seminary, the furnishing the same with fixtures and furniture, and the employment and payment of such teachers and professors, male and female, as may be considered necessary by my said trustees, for the education, board and clothing of the children of my brothers and sisters and their descendants, in the best and most suitable and proper manner for American youths, having a particular regard to a substantial and good English education, and such other higher and ornamental branches as the aforesaid revenues, &c., will enable my said trustees to accomplish, and if the revenues, &c., should be sufficient therefor. I also wish that the poor children in said county of Sumner, of unexceptionable character, and such as my said trustees may select, should likewise be educated and supported during the time at the same seminary. And after the death of my aforesaid brothers, it is my will and desire, that the aforesaid trusts be continued and pass over forever in the heirs of my said brothers, to pass the estate, and that the magistrates of the county court of said county of Sumner and State of Tennessee, and their successors in office, be thereafter the perpetual superintendents of the aforesaid seminary, to see that my intentions be fully carried into effect."

It really seems, that this bequest comes so clearly within the prohibition of our law, and is so utterly opposed to the public policy of the State, that no argument can make the proposition any plainer, and we would at once leave this branch of the case without further comment, if our respect for the eminent counsel opposed to us, did not render imperative the duty of a serious response to the positions assumed by them, and urged with so much apparent conviction on the court. We will, therefore, proceed to sketch rapidly the features, that distinguish the different classes of substitutions and *fidei commissum*, so that we may be readily able to ascertain the proper denomination of the devise in question. In doing this, we shall spare the court any display of industry or learning, by quoting the various authorities on this most subtle and intricate branch of the civil law, and shall confine ourselves to stating the results of our study, so far as may be necessary in elucidation of the particular provision now under discussion. We understand all the authorities as agreeing, at least, on the following propositions:

Substitutions are of two kinds; the vulgar substitution of the Roman law, being that which is defined in art. 1508 of our code, already quoted, and is not prohibited; and the substitution, properly so called, equivalent in its nature to the common law entail, by which the donor or testator undertakes to establish the manner in which the property shall descend, on the death of the donee or legatee, and by which the donee or legatee is prohibited from so disposing of the property as to affect the order of inheritance or descent, thus established by the donor or testator

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*Fidei commissa* are of three kinds: they are all included in what are denominated trusts, in equity jurisprudence.

The first is the naked trust, uncoupled with an interest, to be executed immediately. These, when not intended to vest title in the trustee, are not prohibited, as not being in contravention of the policy of our State, and as being rather mandates than bequests. An example is found in the bequest of a sum of money to a person to purchase the freedom of a slave, on whom the testator wishes to confer the gift of liberty. Such was the case of *Mathurin v. Livaudais*, 5 N. S. 302.

The second is termed by the civilians, the *fidei commissum de eo quod supererit*: that is to say, the gift or bequest of property to A, without any obligation on his part to preserve it, nor prohibition to alienate it, but on condition, that "what may remain" at his death, shall descend to certain persons indicated by the donor. In such *fidei commissa* as these, the gift is good as to the donee, but the reversion in favor of the third person, is null, because by the very terms of the art. 1507, it is only when the donee is "charged to preserve for, or return a thing to a third person," that the disposition is null, even with regard to the donee. Examples of this class of *fidei commissa*, are frequent in our reports. See the cases of *Bernard's heirs v. Soule*, 18 L. R. 24, and *Beaulieu v. Ternoir*, 5 Ann. 480.

The third class is that which includes in the bequest to an individual, the duty or trust that he shall not alienate the property, but shall preserve it for, or return it to a third person, either at the death of the donee, or at some distant period from the date of his receiving the property given or bequeathed. This *fidei commissum* is utterly null and void, even as to the donee, as established by art. 1507.

Let us then test the bequest of *Isaac Franklin*, and ascertain the extent to which it attempts to carry out purposes "reprobated" by our law, in order to determine whether it is to be executed in whole or in part, or be set aside entirely.

The testator declares, that he gives the property in question, "in trust to his two brothers, *James* and *William Franklin*." What is the nature of their title? This question becomes necessary, because however self-evident the answer would seem to the lawyer of any of our sister States, the conveyance in trust is unknown to the civil law. Our code, in treating of ownership, divides it into perfect and imperfect ownership; and it defines perfect ownership to be that which is perpetual, and which is not incumbered with any charge towards any other person than the owner.

A trust estate is therefore clearly not a perfect ownership.

Ownership is imperfect when it is to terminate at a certain time, or on a condition, or if the thing which is the subject of it, being an immovable, is charged with any real right toward a third person as an usufruct. When an immovable is subject to an usufruct, the owner of it is said to possess the mere ownership. C. C. art. 482.

Absolute ownership gives the right to enjoy or to dispose of one's property in the most unlimited manner, provided it is not used in a way prohibited by laws or ordinances.

Persons who reside out of the State, cannot dispose of the property they possess here, in a manner different from that prescribed by its laws. C. C. art. 483.

Usufruct is the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility, and advantages which it may produce, provided it be without altering the substance of the thing. C. C. art. 525.

A comparison of these articles of our code, with the provisions of the will, demonstrate conclusively, that the bequest to *James* and *William Franklin*, is a devise of the mere ownership, and that the usufruct or fruits and revenues of the property are bequeathed to the children of the testator's brothers and sisters and their descendants, or, in other words, to the seminary which has been incorporated by the State of Tennessee, under the name of the *Isaac Franklin Institute*.

As this devise thus decomposes the perfect ownership of the property into its two constituent elements, and leaves the naked title or mere ownership to one devisee, and the usufruct or beneficiary interest to another, it is necessary to examine the character of each of these two bequests, in order to ascertain whether they are substitutions.

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Upon this point, the words of the testator are too clear to admit of doubt or cavil. In bequeathing the naked title to his brothers, he specially prohibits their alienation of it, for he provides that, "after the death of my aforesaid brothers, it is my will and desire, that the aforesaid trust be continued and pass over forever in the heirs of my said brothers, to pass the estate." Here then is an entail that is never to be cut off, a property that is never to be alienated, a substitution in its most offensive form, not only tying up the property out of the reach of commerce, but doing this in the hands of persons who have no interest in its improvement, who are not to reap any of its fruits, who are not provided with the means of effecting ameliorations of any kind whatever, because they are vested with no right to, nor control over the revenues, beyond the employment of them in the support of the seminary. Lewin on Trusts, 138, 24 Law Lib. Lewis on Perpetuities, 592, 52 Law Lib.

How stands the case with regard to the devise of the usufruct or revenues? They are left for the "education, board and clothing of the children of my brothers and sisters, and their descendants, as well as my own children and their descendants;" and the magistrates of the county court of Sumner county and their successors in office, are to be the perpetual superintendents of the seminary.

Now the art. 601 of our code, declares, that "the right to the usufruct expires at the death of the usufructuary." So that, if this devise were perfectly unexceptionable on other grounds, it could by no possibility be extended beyond the children of *Isaac Franklin's* brothers and sisters in life, at the date of his death; and as it is only granted for their education, board and clothing, whilst pursuing their studies, the whole purpose of the testator, as far as he would be allowed by law to accomplish it, would be already effected, or nearly so; at this moment, and as the property in Tennessee is more than sufficient for this, the only purpose legally feasible, it would follow, that no effect could be given to this provision of the will as regards the Louisiana property. But the exigencies of our case do not require that we should assume this narrow ground. The clear intent of the testator is, to entail on the children and descendants of himself and of his brothers and sisters, the revenues of this property forever.

There is scarcely a single object of public policy enumerated in the decisions of our judges, which is not contravened in this bequest.

It places property out of the reach of commerce forever. It separates the naked title from the usufruct forever. It conveys the property to the two brothers, in trust, that they shall preserve it and return it to their heirs, in direct violation of the 1507th article of the code. It places the property beyond the reach of improvement forever. It creates new tenures of property unknown to our law, which does not recognize nor make provision for trust estates. It complicates and embarrasses titles to property; having reference to laws foreign to our jurisprudence, the title conveyed by it, can only be understood by recurring to those laws: it therefore introduces, as regards this particular property, the entire system of the equity jurisprudence of our sister States in relation to trusts, although by our State Constitution, the Legislature is expressly forbidden to introduce that system, or any other system of foreign laws into this State.

Indeed, no provision in a will has ever come to our knowledge more objectionable in its every feature; and, if the court considers that, in the case of *Clague's Widow v. His Executors*, 13 L. R. 7, a former bench annulled a clause in a will, which provided that the property of the testator should remain in the hands of his executors, to be delivered to his children at their majority, on the ground that it was a *fidei commissum*, it is difficult to conceive what possible argument can be advanced to support a devise in which the property is never to be given up at all, but forever to be held and administered for the benefit of others than those who are vested with the title.

We refer the court to the following authorities on the question of domicil and community. As regards substitutions and *fidei commissum*, the numerous briefs recently submitted to the court, contain all that can be required, and we deem it useless to copy them. On domicil and community: C. C. 2370; 42 *et seq.* *Hennen v. Hennen*, 12 L. R. 190. *Saul v. His Creditors*, 5 N. S. 580. *Tourné v. Tourné*, 9 L. R. 457. *Cole's Widow v. Executors*, 7 N. S. 42. *Cole v. Lucas*, 2 Ann. 950. *Ricard v. Kimball*, 5 R. R. 142. *Nelson v. Botts*, 16 L. R. 596. *Williams v. Henderson*, 18 L. R. 557. *State*

SUCCESSION OF *v. Probate Judge*, 2 R. R. 449. *Davis v. Bisson*, 5 Ann. 248. *Magee v. Brown*, 4 Ann. 186. *Waller v. Lea*, 8 L. R. 215. *Tanner v. King*, 11 L. R. 175. *Case v. Clark*, 5 Mason, 70. *Jennison v. Hapgood*, 10 Pick. 77. *Hill and McLean v. Spangenberg*, 4 Ann. 553. *Judson v. Lathrop*, 1 Ann. 79. Story's Conflict of Laws, §§ 44, 47.

*C. Roselius*, for defendant. 1. The first and most important question is, whether the bequest for the establishment and endowment of the seminary or academy, is valid or not?

The objection to its validity is, that it contains a substitution and *fidei commissum*.

The reasons which induced the learned judge of the district court to sustain this objection are, "that the provisions of the will referred to, even if they do not contain a substitution, or *fidei commissum*, in the technical sense of these terms, yet tie up the property of the testator in such a manner, as to place it beyond the reach of commerce, and therefore equally reprobated by law, and opposed to the public policy of the State."

This argument, if argument it can be called, takes for granted, that a testator can, by a disposition of his will, take property out of commerce. But the fallacy of this assumption must be obvious to every legal mind. Things, which are naturally susceptible of private ownership, can only be taken out of commerce by an act of sovereignty; hence, every attempt, by a testator, to take the property of his succession out of commerce, is an impossible condition, and must be reputed as not written. C. C. 1506. N. C. 900. 13 L. R. 7. 12 R. R. 549. 3 Marcadé, No. 485. 5 Toullier, Nos. 241 to 269. 6 Toullier, No. 488. 8 Duranton, Nos. 96 to 111. 9 Duranton, No. 314. 3 Zachariæ, No. 692. Coin Deaillie, pp. 69 and 70. 1 Grenier, No. 149. 11 Locré, p. 7. Journal du Palais for 1807, vol. 6, p. 221; for 1835, vol. 27, p. 38 and p. 1159; for 1841, vol. 37, p. 353; for 1842, p. 646. Pandects, b. 28, t. 7, l. 1, and same book, t. 14, l. 9 and 14. Institutes, b. 2, t. 14, l. 10. Partidas 6, t. 3, l. 3. See also the clear and conclusive argument of the French jurists on this question, in the *McDonogh* will case.

There is only one illegal condition that will affect the validity of the bequest in which it is inserted. "Every disposition, by which the donee, the heir, or legatee, is charged to procure for, and to return a thing to a third person, is null, even with regard to the donee, the instituted heir, or the legatee." All other illegal or impossible conditions, I repeat, are reputed as not written. The distinction between a prohibited substitution and a *fidei commissum* was well explained by this court in the cases of *Ducloslange v. Ross*, 3 Ann. 432; and *Beaulieu v. Ternoir*, 5 Ann. 476.

But, let me ask, on what ground can it be pretended, that there is either a substitution, or a *fidei commissum*, in the will of *Isaac Franklin*? Can any candid mind deny that *Isaac Franklin* intended to establish and endow an academy or seminary? He does not leave his property to his brothers and trustees, but to the institution which he intended to create. He availed himself of their agency, to carry his intentions into effect immediately after his death, without waiting for the slow and tardy action of the government to give a corporate existence to the educational institution, which was the object of his solicitude.

It is contended, by the learned counsel for *Mrs. Acklen*, that a bequest for the establishment and endowment of an academy, is reprobated by our law, and they cite quite a number of authorities to support this startling position. The bare statement of the proposition carries with it its own refutation; and the authorities referred to, do not give the remotest countenance to it.

2. Where was the matrimonial domicile of *Franklin* and his wife?

No doubt, in the majority of cases, the domicile and residence of a person are in the same place; but it does by no means follow that they are convertible terms. The parliament of Paris decided, on the 8th June, 1742, that a certain *Carangeau*, who was born in Paris, and died in Brittany, after having resided sixty-four years in the latter place as superintendent of fortifications, had preserved his domicile in Paris, because he had done no act from which an intention to change his domicile could be inferred. This decision is reported by *Dénisart verbo Domicile*, No. 33.

What is understood by domicile?

Article 42 of the code defines or describes it as follows: "The domicile of each citizen is in the parish wherein his principal establishment is selected. The



principal establishment is that in which he makes his habitual residence; if he resides alternately in several places, and nearly as much in one as in another, and has not declared his intention in the manner hereinafter prescribed, any one of the said places where he resides may be considered as his principal establishment, at the option of the persons whose interests are thereby affected."

This is but an imperfect translation of the Roman law: "Et in eodem loco singulos habere domicilium, non ambigitur, ubi quis larem, rerumque ac fortunarum summum constituit, unde rursus non sit discessurus, si nihil avocet: unde cum profectus est, peregrinari videtur: quod si rediit, peregrinari jam destitit. C. l. 10, t. 39, l. 7."

Which may be translated as follows: "There is no doubt that every person has his domicil in that place where he has his domestic hearth, the principal part of his property, business and fortune; whence he does not wish to depart, unless called away by business, and is a wanderer when he has left it, but ceases to be so on his return to it."

The difficulty in the translation of the Latin text of this law into English, consists in finding an equivalent expression for the word *larem*, which has several meanings. In the glossary it is thus explained: "Animum habitandi perpetuo, et habitat; nam facto opus est, et hoc etiamsi non habet ibi majorem partem rerum." I have paraphrased it by the words "domestic hearth," as more literal, but, there is no doubt, that the sense of the original would be more fully expressed by using the very significant expression "homestead," that is to say, the place where all the conveniences and comforts of life are gathered together.

Facciolati's definition seems to be in uniformity with this idea, "Domicilium, domus, sides domestica, habitatio certa et diuturna."

Judge Story says, "two things then must concur to constitute a domicil: first, residence; and secondly, the intention of making it the home of the party." There must be the fact and the intent; for, as Pothier has truly observed, a person cannot establish a domicil in a place, except it be *animo et facto*. Voet emphatically says, "Illud certum est, neque solo animo atque destinatione patris familias, aut contestatione solâ, sinè re et facto, domicilium constitui; neque solâ domus comparatione in aliquâ regione; neque solâ habitatione, sine proposito illic perpetuo morandi." So D'Argentré says, "Quamobrem, qui figendi ejus animum non habent, sed usus, necessitatis, aut negationis causa alicubi sint, protinus a negotio discessiori, domicilium nullo temporis spatio constituent; cum neque animum sinè facto, neque factum sinè animo ad id sufficiat." Conflict of Laws.

It is obvious, therefore, that residence alone cannot constitute a domicil; for residence consists in the mere fact of inhabiting a place.

Domicil, says Marcadé, is the legal or judicial location of the person; it is an ideal or moral thing created by the law, which indicates the relation existing between the person and a certain spot of earth. In common parlance, however, we are in the habit of calling domicil the house or place where the juridical location is fixed. But that is not the technical sense of the word. The language of the code is: "The domicil of each citizen is in the parish wherein his principal establishment is selected." It is not the establishment or house itself, but at the establishment or house.

The code speaks of civil domicil alone; the political domicil of each citizen is at the place where he exercises his political rights. This kind of domicil is determined by the Constitution and laws of the State, and is not necessarily in the parish, or even State, of the civil domicil.

Domicil may be of three sorts: domicil by birth, *domicilium originis*; domicil by choice, *domicilium proprio motu*; and domicil by the operation of law, as that produced by marriage, minority, &c.

The question of domicil, says Merlin, is frequently not of easy solution; many persons have several establishments at the same time, at different places; they remain six months at one place, and six months at another; return to the first and again go to the second, without any indication where they have selected their domicil. When the facts leave the question doubtful, the domicil of birth is to be preferred, for, as long as there is not clear proof that a person has severed those ties which attach him to the place of his nativity, it is presumed that the true domicil has always continued there. Merlin Rep. verbo Domicil, § 1 and 2.

According to the code, it would seem that a party may have two domicils at the same time: "If he resides alternately in several places, and nearly as much

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If the operation of the rule here laid down, is to be limited so as only to regulate the right of bringing a suit, or giving legal notices, etc., at either of the residences of such a person, it is no doubt a salutary provision; but, if an attempt is made to extend it to the question of domicile, raised in this litigation, between *Mrs. Acklen* and the "Isaac Franklin Institute," it is an absurdity; for each of the contending parties would, of course, choose the domicile of *Franklin* and his wife, in the State most favorable to his interest.

It is clear, therefore, that although a person may have several residences at the same time, he can not have more than one domicile, properly speaking.

In order to subject a party to a particular tribunal, it has always been considered sufficient to show, that he has an apparent domicile, or rather residence, within the territorial limits of the court. But a very different rule obtains when the right of inheritance, or the question of community, depends on the fact of civil domicile. Merlín establishes this difference in the clearest manner. *Rep. verbo Delinatoire*, § 1.

Actual residence is not required to retain a domicile once acquired; it may be retained *anime solo*; and this intention to retain it is always presumed, until the contrary is made manifest by the *animo et facto* which must unite to change the former, and to acquire a new domicile.

Our reports abound with cases, in which the question of domicile has presented itself, in its various phases.

In the case of *Tanner v. King*, 11 L. R. 178, the Supreme Court says: A man's domicile is his house where he establishes his household, and surrounds himself with the apparatus and comforts of life. Though he departs for a season, it is always his intention to return. When once fixed, it will continue until the contrary be affirmatively shown.

The decision in the case of *Hennen v. Hennen*, 12 L. R. 190, is clearly erroneous.

The true principle applicable to the subject was recognized in the case of *Gravillon v. Richards' Executors et al.*, 13 L. R. 297, in which Mr. Justice Eustis says: "The fact of a person remaining in a foreign country, without any intention of establishing himself there, does not operate a change of his domicile; but as soon as the will of making a permanent establishment in the country is combined with the fact of his residence, the residence, even for a few days, fixes the domicile."

But, in the case of *Boone v. Savage*, 14 L. R. the court confounded the civil with the political domicile. The judge, who was the organ of the court, observes: "The articles 42 and 43 of the Louisiana Code, referred to, only provide for cases of a change of domicile, by persons already residents of the State. The present case is that of a person, resident in another State, attempting to acquire a residence here. On this subject a law was passed in 1816. See Moreau's Dig. *verbo* 'Residence,' 308. It declares that, a 'residence within the State shall not be considered as acquired, until the individual, coming into the State, shall have remained within the same twelve months following the date of his notice to the judge, etc.' And a second act, passed in 1818, (2 Moreau's Digest, 309,) alters, in some respects, the previous requisites, but still requires a residence of one year.

"It is already seen that the defendant's declaration was made in December, 1837, and this suit was instituted in April following. If we take the law of 1818 for our guide, still the residence of one year is not shown."

But it is obvious that the laws of 1816 and 1818 have nothing whatever to do with the subject. Those laws evidently refer to political residence, and can have no application to civil domicile. To invoke these laws for the purpose of deciding a question of civil domicile, leads to the most absurd and preposterous results. The court decides that it requires a residence of one year in the State, by persons coming from another State, to acquire a domicile. Until the expiration of that period, they are liable to be sued by attachment as non-residents. But the same law provides, (section 3,) that residence once acquired shall not be forfeited by absence on the business of the State, or of the United States, but by a voluntary absence from this State for two years, or the acquisition of a

residence in any of the other States of this Union, shall forfeit a residence within this State." Thus, then, it follows as a matter of course, by the same process of reasoning, that no attachment will lie against a party who has acquired a residence until after the expiration of two years, to be counted from the day he has voluntarily absented himself from the State, or until he has acquired a new residence in another State of the Union. No doubt the attachment, after such a lapse of time, would be of great benefit to the suing creditor! This is not all: during the same period of time, a citation may be served at the residence of the party, and a judgment may be rendered against him, as if he were present, although in point of fact he may be in France, Germany, China, Russia, or some other distant country! No curator can be appointed to him as an absentee, because, in contemplation of law, he is present. It is said that the articles 42 and 43 only provide for a change of domicile, by persons already residents of the State; but the learned judge who prepared the opinion, seems to have forgotten that these articles of the code contain no new principles, but are only enunciations of the doctrine of domicile, as old as the law itself. Suppose the code had been silent on the subject, would the same rules not have been applied to the decision of the question of domicile? And what possible difference can it make whether the party acquiring a domicile in the parish of Orleans, for instance, comes here from Caddo, or from Kamschatka? The question is always the same with regard to the elements required to constitute a domicile; it is always *animo et facto*. But it is clear that the laws of 1816 and 1818, refer exclusively to political residence; they were passed in pursuance of the 12th section of the Constitution of the State, which provides, that: "The Legislature shall point out the manner in which a man coming into the country shall declare his residence."

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This view of the subject is fortified by the 2d section of the act of 1818, which provides, that: "No alien shall be considered as having acquired all the rights of a citizen of this State, and enjoy the rights of suffrage until, in addition to the requisitions contained in the foregoing section, they shall have acquired a naturalization under the laws of the United States, and become a naturalized citizen of the United States. Provided, however, that this shall not be required of any individual who was a resident of this State, at the time of the adoption of the Constitution of this State."

In the case of the *State v. the Judge of the Court of Probates of New Orleans*, 2 R. R. 449, the same blunder was committed.

The organ of the court says: "The question then is, Where is the domicile of *R. L. Tighman*? The Civil Code, articles 44 and 45, says, that where there is no express declaration as to domicile, the proof of intention depends upon circumstances. This court, in *Gravillon v. Richards' Executors et al.*, 13 L. R. 297, said, as soon as the will of making a permanent establishment in the country is combined with the fact of his residence, the residence, even for a few days, fixes the domicile." This was, perhaps, pressing the principle of domicile too far. The subject was again considered in 14 L. R. 169, when it was held that it required an uninterrupted residence of one year in one of the parishes of the State, to acquire a domicile, and until then a party may be sued by attachment as against a non-resident. The provisions of the acts of the Legislature, passed in 1816 and 1818, are plain. The first section of the latter act says, that there must be a residence of "one year without interruption," in one of the parishes of the State, the party having, in the mean time, purchased or rented a house or room, or parcel of land, or pursued some profession or employment for a support. *Bullard and Curry's Dig.* 286, 287, sec. 1 and 2. The letter of the law is too clear to be misunderstood; and it seems to have been made to operate on that description of persons who come to our State for purposes of their own, and never identify themselves with our interests and institutions.

Shortly after the organization of the present judiciary, the subject came up for decision, in a number of cases, and the correct doctrine was invariably applied.

In the case of *Judson v. Lathrop*, 1 Ann. 78, it was held, "that where a party resides alternately in different parishes, the judicial declaration governs, when the residences appear to be nearly of the same nature, *si sa résidence dans chacune est à peu près la même*. See, also, *Cole v. Lucas*, 2 Ann., 950. *McGehee v. Brown*, 4 Ann. 186. *Hill v. Spangenberg*, 4 Ann. 554.

A man's old domicile, says the court in the case of *Favrot v. Delle Piane*, 4 Ann. 586, can only be changed by the adoption of a new one *animo et facto*.

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While the suit for the partition was pending, and ready for trial, *Mrs. Acklen* applied for and obtained an order putting her in possession of all the property for the partition of which the parties were then before the court. From this decree a separate appeal was taken, which may as well be disposed of with the present case, for it is, in fact, only an incident in the main action. The judgment of the district court, on this branch of the case, is so palpably erroneous, that I deem it useless to do more than to state the fact that such a judgment was rendered.

*John L. Lobdell*, for defendant. The counsel refers the court to the following authorities on the points raised and argued in this case, to wit:

1st. Citizenship. 9 M. R. 491; 11 do. 440; 4 do. N. S. 51; 5 do. 571 to 599; 6 do. 76; 7 do. 44. 8 L. R. 43, 213, 555; 11 do. 175; 12 do. 190; 13 do. 293; 14 do. 169; 14 do. 596; 17 do. 589; 18 do. 557, 563. 2 R. R. 449; 3 do. 243; 5 do. 142; 6 do. 192; 8 do. 106; 9 do. 348; 12 do. 334. 1 Ann. 78; 2 do. 946. *Bullard and Curry's Digest*, p. 286, secs. 1 and 2; p. 287, secs. 3, 4, 5. Civil Code, arts. 10, 42, 43, 44, 45, 77, 175, 929, 1130, 2270. Code of Practice, arts. 164, 166, 167, 168, 1022.

2d. The Notarial Acts, Renunciation, Community, &c. 10 M. R. pp. 577, 571; 12 do. 114; 3 do. N. S. 626; 4 do. 543; 5 do. 257, 260, 361, 634; 6 do. 139, 207, 325. 2 L. R. 214, 565; 3 do. 29, 479; 4 do. 190, 191, 316, 461; 5 do. 113, 126, 395; 6 do. 105, 185, 500; 7 do. 17, 42, 156, 216, 226, 292; 8 do. 489; 9 do. 254; 10 do. 291, 453, 580; 11 do. 70, 176, 374; 12 do. 105, 539; 14 do. 523. 1 R. R. pp. 86, 378; 2 do. 182; 3 do. 171; 4 do. 71, 128, 208, 207, 290, 335, 397; 5 do. 299, 475; 7 do. 398, 406, 418; 9 do. 3, 438. 2 Ann. 30, 226, 259, 575, 762. Civil Code, arts. 1, 10, 42, 484, 1315, 1724, 1755, 1761, 1767, 1791, 1792, 1797, 1815 to 1820, 1840, 1854, 1875, 1876, 1887. Acts of Legislature of Louisiana, 25th March, 1844, p. 99.

3d. The validity of the bequest and devise to the Seminary. 6 R. R. 235; 7 do. 146, 425, 481; 8 do. 262, 414; 9 do. 438; 12 do. 334, 539. 1 Ann. 162; 2 do. 377, 580, 774, 980. Civil Code, arts. 10, 483, 1652, 1705, 1706, 1708, 1717, 1718, 1721, 1941 to 1957.

5th. Whether the residuary legatees have to pay the specific legacies, or the children and seminary *pro rata*, or the executors out of the mass of the succession, as directed by the will. 8 L. R. 43; 11 do. 220; 17 do. 312. 2 R. R. 1; 12 do. 334, 639. 2 Ann. 30.

9th. The judgments homologating the administrations of the executors, are *res judicata*. 5 Mar. N. S. 466. 6 L. R. 472. 2 R. R. 429; 9 do. 438; 12 do. 334. Civil Code, arts. 429, 430, 1230, 1347, 1360, 1369, 1373, 1374, 1376, 1379, 1480, 1489, 1491, 1492, 1600, 1601, 1603, 1604, 1606, 1607, 1619, 1626, 1627, 3522, sec. 29.

12th. The ameliorations, &c., having been made on the plantations in the parish of West Feliciana, by the executors, the partition ought to be made. 1 Mar. N. S. 324; 6 do. 350. 3 L. R. 494; 3 do. 128; 4 do. 300; 5 do. 107; 7 do. 383; 16 do. 483. 5 R. R. 453; 9 do. 438; 10 do. 118. Civil Code, arts. 1214, 1215, 1216, 1217, 1218, 1219, 1223, 1224, 1246 to 1253, 1258 to 1260, 1269, 1273, 1286 to 1304. Code of Practice, arts. 1020, 1021, 1022 to 1032.

*J. A. Patterson*, attorney and under-tutor. We claim, that as the domicil of the father being in Louisiana, all the personal property of every kind and description, and wherever situated, belongs and must be distributed according to the laws of Louisiana, and refer the court to the following pages of the record for the testimony on that point: First, the declaration made and recorded in New Orleans, by *Isaac Franklin*, p. 352, and the testimony of several witnesses, proving his acts and declarations, pp. 360, 369, 384, 387, 391, 397, 401. See also the will, item 5: "At my death," he states that it is his "desire that his house servants shall be removed to Tennessee."

If the court should be of opinion, that the renunciation made by the mother of the minor is binding and valid, then we claim that the community so renounced goes absolutely to the heirs, and no part of it to the residuary legatees, as it never belonged to the deceased in his lifetime, and if renounced by his widow, must go directly to the forced heirs. 7 R. R. 430. For the validity of the renunciations, he relies on the authorities cited by the counsel of the trustees.

By the court: (*Preston, J. dissenting.*)

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*Rost, J. Adelecia Acklen*, the former wife of *Isaac Franklin*, deceased, seeks to set aside, on the ground of error, various acts by which she renounced all her rights in the property composing the succession of her late husband, and claims her community rights therein, on the ground that at the time of her marriage with *Franklin*, in the State of Tennessee, in April, 1839, he was domiciliated in this State, and that the matrimonial domicile having been in Louisiana until the dissolution of the marriage, the distribution of the real estate acquired here during its continuance, and of the personal estate, wherever situated, should be according to the law of Louisiana.

The plaintiff, also, in her own right as heir of two of her children, deceased since their father, and as tutrix of *Emma Franklin*, the only surviving issue of her former marriage, seeks further to annul the universal legacy made by *Isaac Franklin*, to his brothers *James* and *William Franklin*, in trust, for a seminary of learning to be established in Sumner county, in the State of Tennessee, so far as it disposes of property in Louisiana, on the ground that the title thus created is in violation of the laws of Louisiana; that its effect would be to tie up and to place out of commerce the property bequeathed, against the policy of the State; and that if the title was otherwise valid, it would be void by reason of the substitutions and *fidei commissa* which it contains.

The under-tutor of the minor has also intervened in her behalf, claiming the nullity of the universal legacy.

The defence to these claims is, that the domicile of origin of *Isaac Franklin* was in Sumner county, State of Tennessee, that he never changed it, and no community, at any time, existed between him and his wife. That he made for her, by his will, ample provisions, which she has accepted; and that she is estopped, by her acceptance, from contesting the validity of any of its dispositions. That the acts of renunciation were signed by her, of her own free will, and with full knowledge of her legal rights.

The Franklin Institute has been incorporated by the Legislature of the State of Tennessee, with full power to receive the legacy and to carry the dispositions of the will into effect, and the trustees appointed under the act of incorporation, have made themselves parties to the record, and have joined the executors in the defence, averring the legality of the bequest in favor of *James* and *William Franklin*, of one-third of the plantations and slaves of *Isaac Franklin*, in Louisiana.

The record is voluminous, and the pleadings it contains raised many other issues in the district court, but I understand the points stated to be the only ones submitted for our decision; they were decided in the court below, in favor of *Mrs. Acklen* and her minor child. The executor and the trustees of the Franklin Institute have appealed from the judgment.

Article 2369 of the Civil Code provides, that every marriage contracted in this State, superinduces, of right, a community of acquets and gains, if there be no stipulation to the contrary.

The marriage, in this case, was not contracted in this State; it did not, therefore, superinduce of right a community of acquets and gains, and the existence of the community can only be predicated upon the next article of the code, which is as follows: "A marriage, contracted out of this State, between persons who afterwards come here to live, is also subjected to the community of acquets, with respect to such property as is acquired after their arrival."

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To establish the position assumed, the plaintiff must show, that, after her marriage, her husband and herself came here to live. She must make all the proof necessary to establish the domicil of *Franklin* in Louisiana; and further, that they both came to that domicil to live, and that they did live there until the marriage was dissolved, by the death of *Franklin*.

I will first dispose of the question of domicil, and, in relation to it, I may premise, that the district judge properly overruled the exception taken by the counsel of *Mrs. Acklen*, to the admission of the depositions taken under commission by the executors and trustees, to prove that the matrimonial domicil was in Tennessee, and because the cross-interrogatories have not been answered. Those depositions were received by the magistrate to whom the commission was sent, in the presence of the parties and their counsel, and the cross-interrogatories were answered, as far as the parties in interest desired them to be so; the cross-interrogatories, not answered, were irrelevant to the issue, and of such a character, as would have justified the district judge, if he had caused them to be erased from the records of his court.

The district judge says, in his opinion, that he is satisfied, from the evidence, that the domicil of *Isaac Franklin*, at the time of his marriage, and up to the period of his decease, was in the State of Louisiana. It is with great reluctance that we differ from the judges of the first instance on questions of fact; but a question of domicil is not a mere question of fact, and we may well agree with our learned brother on all the facts going to show a residence in Louisiana, and, at the same time, differ from him on the legal inferences he draws from those facts, that the residence they establish, was the domicil of *Isaac Franklin*. His domicil of origin was in Sumner county, State of Tennessee; that domicil, of course, continued until another was acquired, *animo et facto*. And the parties seeking to avail themselves of the change of domicil, from Tennessee to Louisiana, must prove it by express and positive evidence; so long as any reasonable doubt remains, the legal presumption is, that it was not changed. See *Grevillon's Heirs v. Richards' Exrs.*, 13 L. R. 299. *Cole v. Lucas*, 2 Ann. 250. *Merlin Rep. verbo Domicil*, § 2. *Story's Conflict of Laws*, No. 41.

Does the evidence, in this case, establish, beyond reasonable doubt, that the domicil of *Isaac Franklin*, at the time of his marriage, and up to the period of his decease, was in the State of Louisiana?

The witnesses for *Mrs. Acklen*, all testify that much the largest portion of his fortune was in Louisiana; that they considered him as domiciliated in the State before and since his marriage; and that, they believe, he so considered himself. The witnesses of the executors, in greater number, and of equally unimpeachable character, testify, still more positively, that his domicil was on his Fairview plantation, in Sumner county, State of Tennessee; that he so considered it himself, and that nobody there knew, or suspected, that it had ever been changed. Conflicting, as this evidence is, the acts and declarations of *Franklin* himself are, if possible, still more so. He voted in the parish of East Feliciana, where his plantations are situated, for a member of the police jury, and also at the presidential election of 1844; on both occasions his vote was at first challenged, but finally received, on his declaration, that he had voted no where else for seven years. The justice of the peace who presided at those elections, has testified that *Franklin* was not sworn on those occasions, every body being satisfied with his declaration; yet, there is record evidence that he voted in Sumner county, in the State of Tennessee, at the general elections of 1841 and 1843, and that, up

to the time of his death, his name was registered, under a law of the State, as a voter of that county. Many notarial acts are produced, passed between the years 1838 and 1846, in which he represented his domicile, or rather his residence, as being in Louisiana; but, it is in proof, that he availed himself of his privilege, as a citizen of Tennessee, to bring suits in the federal court, in this city, in 1840 and 1844; and that, in the latter part of 1845, a few months before his death, he was sued, as a citizen of Tennessee, in one of the courts of this city, and answered to the merits without pleading his domicile in West Feliciana. His statement to *Mr. Warfield*, that he could change his domicile from Louisiana to Tennessee, and back, for five dollars, when his business required it, shows what he understood by domicile, and that the *animus manendi* had nothing to do with it. The declaration of intention to change his domicile, from Tennessee to Louisiana, made in 1832, is falsified by his subsequent acts, and the erection of a permanent family residence in Tennessee. He was, at that time, a slave dealer, and was absent every summer from the State; the object of the declaration was, no doubt, to evade the law, as settled by the decisions of the Supreme Court, that the prescription of one year against the redhibitory action, was suspended during the absence of the party, who had sold the unsound slave. *Morgan v. Robinson*, 12 M. R. 76. Much reliance is placed on two letters from *Franklin* to his father-in-law; the first was written on board of a steamboat coming down the river, and in it, *Franklin* says, that he will, without accident, be at home on the next day; the other was written from New Orleans, in January, 1846, in which, after attending to the misconduct of his slaves on the Fairview plantation, he says: "I will be compelled to break up that whole establishment, if I do not change my mind. I will take the greater part of the hands off next fall, and put them on some of my lands in Louisiana; they give me more trouble than all my other property."

I do not attach to this evidence the importance which counsel do; he might well have his domicile in Tennessee, and call his Feliciana plantations his home, while in Louisiana. When he speaks of breaking up his establishment in Tennessee, he evidently contemplates the breaking up of the planting establishment there, by removing the greater part of the one hundred and thirty slaves, attached to the Fairview plantation, to Louisiana, and leaving only such as might be necessary for the care of the grounds and buildings, and of the stables and stock; he might have done all this without the least intention to change his domicile. The law which fixes the domicile of each citizen at the place where his principal establishment is situated, means the principal domestic establishment, not that where he may have the largest portion of his fortune. Art. 42 C. C.

In France, where, owing to the different systems of laws and customs formerly existing in the different provinces, questions of domicile have been much discussed, and are thoroughly understood, it is held, under a legislation which we have copied, that a place where a person exercises his political rights, and where the bulk of his property is situated, is not reputed his place of domicile, if that person, having a dwelling house elsewhere, habitually occupies it, and pays there his *taxe personnelle et mobilière*. See the case of *Saiffert v. Seranega*, 10 Sirey, part 2, page 55.

There are other facts, not yet noticed, which far outweigh, in my mind, the statements in *Franklin's* letters, and the other evidence offered by *Mrs. Acklen*. *Franklin* was born in Sumner county, where his father gave him a farm, after he became of age; he then engaged in business, spending the summer months in the district of Columbia, and the remainder of the year in

**SUCCESSION OF New Orleans and Natchez. He soon became wealthy, purchased the Fairview estate, near his Tennessee farm, and erected upon it a large and costly mansion, which is shown to be the finest country residence in Tennessee. The grounds around were planted with choice trees, and laid out in the best manner; here he had green houses, flower gardens, sumptuous furniture, several fine carriages, choice wines of all kinds, a stable of race horses, a large quantity of blooded stock, and a number of picked servants, more than sufficient even for such an establishment. All this was done with the avowed purpose of making Fairview his permanent domicile. He was engaged in business until 1839, but although, up to that time, he only occupied his new dwelling a few days in each year, his intention, coupled with that occasional residence, was sufficient to continue his domicile on the Fairview estate. In 1838 he acquired a large estate in West Feliciana, and married *Mrs. Acklen* in the spring of 1839; from that time to his death, with one or two exceptions, he spent his summers with his family on the Fairview estate, leaving about the middle of October, of each year, to return to Louisiana, where he remained until the month of May following. The nature of his residence here is stated as follows, by *Mr. Row*, one of *Mrs. Acklen's* witnesses :**

"*Mr. Franklin* usually remained at his plantation, when he returned in the fall, some one, two, or three weeks, and then took his family to New Orleans, where they remained some time, and returned to the plantation, and so went and returned to and from New Orleans, two or three times during the winter." He spent more than half of his time in the city of New Orleans, and, it is proved, that he passed the entire winter of 1845 there, in a rented house. The house he occupied, when upon the plantation, was old, and out of repair. The servants who waited upon him there, were those he brought with him every fall from Tennessee. He kept no carriages, had done nothing to improve the grounds, and had none of those comforts and luxuries in which he delighted, and by which his home in Tennessee was rendered conspicuous. The fact, sworn to by some of the witnesses, that he intended to erect a new house in West Feliciana, weighs but little on the question of domicile at the time of the marriage. In 1841, when he was declaring, in notarial acts, that his domicile was in this State, he was secretly making his will, in which he represents himself as of Sumner county, State of Tennessee, now residing, for the present, in West Feliciana; designates the Fairview estate as the future residence of his wife and children, and gives his wife the household and kitchen furniture, and the stock of wines and groceries, found on the place at the time of his death. None of these, which so essentially constitute his domestic establishment, appear to have existed on the Louisiana plantation. In that will, also, he ordered his executors to consecrate at least one acre of ground on the Fairview estate, to the erection of an expensive family vault, in which his remains, those of his wife and children, and of such other members of his family as might choose to be entombed there, were to be deposited, and requested them, if he should die at any other place, to have his remains removed there without unnecessary delay. I take this disposition and request to be strong evidence against *Mrs. Acklen*. The belief of the Romans, that the souls of the departed abided near their earthly remains, and, under the name of *lares*, were the guardian spirits of their descendants, was a beautiful superstition, and, even Christians may hope, without sin, that they will be permitted, in another life, to watch over and protect their offspring. The reason of the rule of the civil law, which made the presence of the *lar* indicative of the place of domicile, has survived the superstition that gave it birth.



The place selected by the testator, in this case, for the final resting place of himself and his family, was, I cannot doubt, the home of his choice, the place where his spirit dwelt during life, and whence, in the language of the Roman Code, he had no desire to depart, unless compelled by business, and was a wanderer when he had left it, but ceased to be so when he returned to it. C. 10, 39, 1. 7.

The law of domicil, as it bears upon a case where the party has two residences, was examined with great care by this court, in the case of *Hill et al. v. Spangenburg*, 4 Ann.; and the authorities adduced in this case, have confirmed us in the view we then took. "Where each of the residences is accompanied by some of the circumstances, going to show the existence of the domicil, the judge should be guided by the most convincing; he should also take their number into consideration; and if, by their weight and number, they neutralize each other, the presumption that there has been no intention to change the domicil, must prevail; and, if the party has divided his time alternately between the two places, this habitual change should be considered as of no importance, if he has not done, where the new domicil is claimed, a series of acts, proving, beyond reasonable doubt, his intention to abandon his old domicil." 1 Duranton, No. 358. Tested by these principles, the case is clearly against *Mrs. Acklen*. So far from having shown affirmatively, as she was bound to do, that the domicil had been changed, I think it is satisfactorily proved that the change never took place. *Franklin's* domicil having continued in Tennessee, it necessarily follows that he and the plaintiff never came here to live, and that their marriage was not subjected to community of acquets and gains.

This case is strikingly similar to that of *DeSinceny, c. Ses. Syndics*, found in Dalloz, 1849, 2 part. p. 71. The plaintiff, in that case, had established at his new place of residence a large sugar refinery, had lived there many years, had been appointed maire of the commune, chef de bataillon of the national guards, and placed on the list of electors, had represented himself in a great number of acts as a sugar refiner of that commune, and had made a declaration of domicil, in due form, a short time before his failure.

But the court, considering that the first domicil was that of his nativity; that it had been his habitual place of residence; that the traditions of his family and the habits of his life, as well as the largest portion of his fortune were there; that if, in a great number of acts, under private signature, he stated the last place of residence to be his domicil, those declarations lost their weight when at the same epoch, and in acts more serious, he retained his original domicil; that the declaration of domicil lately made by him, would not have been necessary, if, in truth, his domicil had been as stated, and was, moreover, falsified by the facts of the case; that his furniture and household establishment were still at the original domicil, and that none of the facts proved, implied the certainty of the complete abandonment of that domicil, maintained the exception to the jurisdiction of the court of his last place of residence, over the *cessio bonorum*.

Having come to the conclusion that no community ever existed between *Mrs. Acklen* and *Isaac Franklin*, it is unnecessary to examine the grounds of nullity alleged against the acts of renunciation, which she signed; her rights against the succession rest upon the will alone, and the errors set up by her have not impaired those rights.

The only question remaining is as to the validity of the bequest of one-third of the real estate and slaves belonging to the succession of *Isaac Franklin*, in Louisiana, to *James* and *William Franklin*, in trust, for the Franklin Institute,

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The bequest is as follows: "I give and bequeath all my property, real and personal, of whatever kind or nature, that is situated in the States of Tennessee and Mississippi, or any other common law State where trust estates can be created, together with my bank stocks, and effects, and credits; and in case I should have no other children by my said marriage, except my said daughter *Victoria*, then two-thirds of all my property, movable and immovable, that is situated in the State of Louisiana; but if there should be two children born of said marriage, then only an undivided half of all my said property, movable and immovable, slaves, &c., that is situated in said State of Louisiana; and, if there should be three or more children born of said marriage, then I only give an undivided one-third part of all my said property, movable and immovable, slaves, &c., that is situated, lying and being in said State of Louisiana; and, also, the rest and residue of my estate, wherever situated, in trust to my two brothers *James* and *William Franklin*, of Sumner county aforesaid, for the following purposes, to wit: The revenues arising from said property, bank stock, and such money, funds or other credits due me, as may remain after the payment of the several legacies and devises, annuities, increase and ameliorations of my said plantations in Louisiana, and other purposes, as directed by this will, together with the revenues arising from my plantations in Tennessee, and other property in Tennessee and Mississippi and other common law States, together with the dividends of my bank stock and interest on money and debts due me; and the revenues of the one-third, one-half, or two-thirds of all my property situated in the State of Louisiana, as the case may be, by the birth of children of my said marriage, after the payment of said several devises and legacies, annuities and expenditures, increase and ameliorations of said plantations in Louisiana, &c., to be laid out in building proper and suitable edifices, on my said Fairview plantation, in the county of Sumner and State of Tennessee, for an academy or seminary; the furnishing the same with fixtures and furniture, and the employment of such teachers and professors, male and female, as may be considered necessary by my said trustees for the education, board and clothing of the children of my brothers and sisters and their descendants, as well as my own children and their descendants, in the best and most suitable and proper manner for American youths, having a particular regard to a substantial and good English education, and such other higher and ornamental branches as the aforesaid revenues, &c., will enable my said trustees to accomplish; and if the revenues, &c., should be sufficient therefor, I also wish that the poor children in said county of Sumner, of unexceptionable character, and such as my said trustees may select, should likewise be educated and supported, during the time, at the same seminary; and after the death of my aforesaid brothers, it is my will and desire that the aforesaid trust shall be continued and pass over forever in the heirs of my said brothers, to pass the estate, and that the magistrates of the county court of said county of Sumner, and State of Tennessee, and their successors in office, be hereafter the perpetual superintendents of the aforesaid seminary, to see that my intentions are fully carried into effect."

The title which the testator has attempted to create, belongs to a class of tenures familiar in the other States of this Union, where the common law prevails, but unknown to the laws of Louisiana. And the jurisprudence regulating and defining the almost infinite variety of those tenures, and the rights of obligations arising under each, forms one of the most important and intricate portions of that artificial system of laws. I do not see the possibility of recognizing trust estates here, without letting in all the law which regulates that peculiar tenure

of property. Counsel have referred us to no precedent that would authorize or justify the enforcement of such a title; and it is a self-evident proposition, that the constitutional inhibition to the Legislature to adopt any system of foreign laws, by general reference, would be rendered nugatory, if courts of justice assumed the power to introduce those systems, by piecemeal, in this insidious manner.

The case of *Harper v. Stansborough*, 2 Ann. 380, was a much stronger one than the present in favor of the legatee; in that case the bequest had been made in the State of Mississippi, where it was authorized by law; the testator had died there, and the law of that State had had its full effect on the slaves in dispute, during several years, when they were removed to Louisiana, where the surviving son of the testator came to claim them from *Stansborough*, who had purchased them at the probate sale of the succession of the other son, on the ground, that by the dispositions of the will they were to revert to him after the death of his brother. Even under that state of facts we held, that as no such title to property, as that under which the plaintiff claimed, was recognized by the laws of Louisiana, the courts of the State could not enforce it upon property found here, although it might be valid in the place where it was created. The chief justice, who was the organ of the court in that case, says, "slaves are considered in Louisiana as immovables, and it rests with the legislative power of the State, exclusively, to regulate the different descriptions of property, or ownership in relation to them. The modifications of the rights of property, under our laws, are few and easily understood, and answer all the purposes of reasonable use; it is incumbent on courts to maintain them in their simplicity."

This opinion has since been reviewed and affirmed in the case of *Terrell et al. v. Allen*, 7 Ann., and the principle it involves is recognized in every system of jurisprudence. It is thus elucidated by Lord Brougham, in the case of *Kippell v. Bayley*, 8th English Chancery Reports, 120: "There are certain known incidents to property and its enjoyment; among others, certain burdens where-with it may be affected, or rights which may be created and enjoined over it by parties other than the owner, all which incidents were recognized by law.

"All kinds of property, however, all these holdings, are known to the law, and familiarly dealt with by its principles. But it must not, therefore, be supposed that incidents of a moral kind can be devised and attached to property, at the fancy or caprice of any owner. It is clearly inconvenient to the science of the law and the public weal, that such latitude should be given. There can be no harm in allowing the fullest latitude to men in binding themselves and their representatives—that is, their assets, real and personal, to answer in damages for breach of their obligations. This tends to no mischief, and is a reasonable liberty to bestow; but, great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote."

It was contended, in argument, that the only illegal conditions which could affect the validity of a testamentary disposition, were those containing prohibited substitutions; that all other illegal or impossible conditions were to be reputed not written.

Under the hypothesis, that the words in trust, in this case, should be reputed not written, the title must have vested in the original trustees, in full ownership; and, if it did, the charge to preserve and return the property to other persons after them, would be such a substitution as would avoid the entire disposition.

SUCCESSION OF FRANKLIN. But I am satisfied that this case does not come within the rule established by article 1506 of the code.

When the words of the testamentary disposition are sufficient to vest a legal title in the legatee, and the intention of the testator to create such a title for his benefit, to the exclusion of the heirs at law, and of all other persons, is ascertained, then, in furtherance of that intention, any impossible or illegal condition the disposition may contain, is presumed to have been inserted inadvertently and is reputed in law, not written; but where the title, created by the will, as ascertained by the words used and the intention of the testator is a tenure of property which our laws do not recognize, the attempt to change the nature of it and to convert it into a title valid under our laws, would no longer be an interpretation of the will, but the making of a new will for the testator. When it is manifest, says Coin Delisle, that the testator has not correctly expressed his thoughts, the proper, natural and unusual sense of the words should only be departed from, to adopt the less usual and less correct sense which the will shows he gave to them, without placing arbitrarily in the place of the written disposition, another disposition which the terms used in no sense authorize; this would no longer be interpreting or explaining the will, it would be disposing for the testator. Donat. and Test. book 3, tit. 2, No. 7.

I put this case upon the principle, that when the conviction is of the essence of the title created by the bequest, and intended by the testator, so that the title cannot stand without it, if that title be one which the law does not recognize, courts of justice cannot replace it by another, and the disposition must fall.

There is another serious objection to the claim of the trustees. Art. 1477 of the code provides, that donations *mortis causa* may be made in favor of a stranger, when the laws of his country do not prohibit similar dispositions from being made in favor of a citizen of this State. The property bequeathed, now in controversy, is all immovable under our laws, and is to be held in Tennessee, for the benefit of a charity created there. The trustees have not shown, that neither a citizen or a corporation of Louisiana, can take real estate by will in Tennessee, or if they can, that they would have power to hold and administer it, for a charity in Louisiana. It is said they may, because the prohibition of the code has exclusive reference to citizens of other countries, and should not be extended to sovereign States or corporations. This is manifestly wrong; the authority of Mackeldy, cited in support of another part of this case, shows, that under the civil law, corporations required the action of government to give them the powers of natural persons, and that they possess no others.

By the textual provision of our code, corporations legally ordained, are substituted for persons. Art. 423. *Milne's Heirs v. Milne's Executors*, 17 L. R. 54. The only questions which have heretofore arisen under that provision, were, whether corporations had the capacity to take by will, as natural persons; it has never been pretended before, that they enjoyed all the rights without being subject to the disabilities of natural persons. It has been urged, that the prohibition to a citizen of Louisiana to make donations *mortis causa* in favor of citizens of other States, conflicts with the second section of the 4th article of the Federal Constitution, guaranteeing to the citizens of each State, all the privileges of citizens of the several States. This argument may be answered by inquiring, whether the article of the Constitution also applies to black citizens of Massachusetts or Ohio coming to Louisiana, and whether such a latitude

dinarian construction would not be destructive of the sovereignty of the State, as well as of the security of its inhabitants. SUCCESSION OF  
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The disability of citizens of one State to inherit real estate in another, as well as the disabilities resulting from color in the slave States, existed before the adoption of the Federal Constitution, and during the sixty three years it has been in operation, the article invoked has never been held to apply to either class of cases. It is too late now to adopt a different interpretation.

But all this argument assumes, that there is in this case a foreign corporation created, in execution of the will of the testator. The fact is not so. The bequest is not made to a corporation to be created after the death. And I do not understand how the trustees under the will, can be viewed merely as detainers of the estate until the charity was incorporated, and the bequest itself, a naked trust, uncoupled with an interest, to be executed as soon as practicable, when the testator, so far from providing for such an incorporation, expressly directs that the trust shall be continued and pass over forever in the trustees appointed and their heirs. Nor is it true, that the trust was uncoupled with an interest. The charity of the testator began at home; the institution contemplated by him, is for the education of the descendants of the trustees, who were, in succession, to manage the trust to the end of time; they all had a direct interest in the bequest, and on that ground also, if the title was otherwise valid, I would be inclined to consider the bequest not merely as an attempt to create a perpetuity, but as containing an indefinite series of prohibited substitutions. In principle, this case cannot be distinguished from that of the *Philadelphia Baptist Association et al. v. Hart's Executors*, 4 Wheaton, p. 1, decided under a system of laws, which goes further than ours in the maintenance of charitable bequests. In that case, the bequest was made in trust to an association unknown to the law; the court held, that it could not take, and that its subsequent incorporation could not give it capacity to receive, to the prejudice of the next of kin; the court intimated, that if the trustees named in the will had been authorized to execute it, as individuals, the bequest would have been sustained, because trust estates are recognized at common law; but as they are unknown to the laws of Louisiana, the trustees in this case occupy identically the same position which the individual members of the unincorporated association occupied in the other. Chief Justice Marshall, the organ of the court in that case, said in his opinion, "the bequest was intended for a society which was not at the time, and might never be, capable of taking it; according to law, it is gone forever; the legacy is void, and the property vests, if not otherwise disposed of by the will, in the next of kin. A body corporate, afterwards created, had it even fitted the description of the will, cannot divest this interest, and claim it for their corporation."

In a subsequent case, Mr. Justice Story says, with reference to that opinion, "upon that occasion, I had prepared a separate opinion, but that of the chief justice was so satisfactory to me, that I did not deem it necessary to deliver my own." 3 Peters, 148.

The case of *Milne's Heirs v. Milne's Executors*, already quoted, was one of a bequest *per verba de futuro* to corporations not then in existence, which was to take effect when the corporations should be created. And in the case of *Inglis v. The Trustees of the Sailors' Snug Harbor*, 3 Peters, 145, the majority of the Supreme Court of the United States, interpreted the devise as being one of the same class; neither of these cases conflicts with the decision

SUCCESSION OF in the case of the Baptist Association, which is on all hands, admitted to be law.  
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I concede, that the weight of authority, under our system of jurisprudence as well as at common law, is in favor of the validity of dispositions *per verba de futuro*, to corporations not *in esse*, to take effect when they are created. But the bequest in this case, is of a different kind; in the words of Judge Story, "it is a devise *in presenti* to persons who should be officers at the death of the testator, and to their successors in the trust; the vesting of the devise was not to be postponed to a future time, until a corporation could be created. It was to take immediate effect, as in the case of the Baptist Association. See the case of the Sailors' Snugbarbor.

It has been further urged, that the character of this legacy as a charity, entitles it to the protection of the court, and that we are bound to interpret it in the sense in which it can have effect, rather than that in which it can have none. This rule of interpretation is subordinate to the one which precedes it in the code, that in the construction of acts of last will, the intention of the testator must principally be endeavored to be ascertained, and is only applicable to cases in which that intention is left doubtful. Art. 1705.

A testament is a law, and the first duty of courts in this, as in other laws, is to ascertain the *mens legislatoris*; when it is once ascertained, beyond reasonable doubt, it must be followed, and the disposition stands or falls, as the intention of the testator can or not be carried into effect consistently with the rules of law. The testator's intention in this case, was to create a perpetuity and a new tenure of property; that intention is a legal impossibility, and the disposition falls.

Under the view I have taken of the case, it is unnecessary to answer the argument, that the establishment of perpetuities by will, is not prohibited in Louisiana. I may state, however, that the powers given to testators by the code, are exceptions to the general law, regulating the devolution of property; that they are limited both as to form and substance, and that it is not enough to say, that perpetuities are not prohibited, it should be shown that they are authorized. The testator has full power to vest in his legatees the title to the property he leaves; but he cannot vest in them a title which he has not, and if he attempts to do so, the legal title of which he does not dispose, passes to his heirs at law; the extent of his power over his property after his death, is the right to separate the usufruct from the ownership for a single life. If he attempts in any manner to control the descent of the property after the death of the first legatee, the entire disposition falls. He cannot change the nature of the title he transmits, or, in the language of Lord Brougham, "impress upon his lands and tenements a peculiar character, which should follow them into all hands however remote;" such as would be impressed upon them by the creation of a perpetuity. His power is limited to the transmission of the title he holds. He may use, and abuse, his property, while he lives, and delegate those rights to others by will; but he must divest himself of both, when the power to use terminates; by his death the right to abuse also ceases; and if he attempts to exercise that right by creating a title which cannot be enforced, without subjecting the soil of Louisiana to the dominion of foreign laws, the disposition falls, and is superseded by the general law of successions, unless the heirs at law have themselves been superseded by other dispositions in the will.

For the reasons assigned, it is ordered, that the judgment in this case be reversed. It is further ordered, that in the settlement of the succession of

*Isaac Franklin*, his domicil be considered as having been in the county of Sumner in the State of Tennessee. It is further ordered, that the compromises entered into between *Mrs. Acklen* and the executors, and the renunciations made by her to the community rights she might have in the property left by *Isaac Franklin*, be held valid and binding; and that there be judgment against her upon her claim, as common in acquets and gains. It is further ordered, that the universal bequest contained in the will in favor of *James* and *William Franklin*, in trust for the purposes therein specified, be set aside and annulled, so far as it bears on the real estate, slaves and immovables, by the destination of law in the State of Louisiana. It is further ordered, that the said *Mrs. Acklen* recover from the executors and trustees of the Franklin Institute, all the said real estate, slaves and immovables, by the destination of law in Louisiana, 19-96ths in her own right as heir of her two children, *Victoria* and *Adelicia Franklin*, and the other 77-96ths as tutorix of her minor daughter *Emma Franklin*. It is further ordered, that the costs of the district court be paid by the succession, and those of this appeal by *Mrs. Acklen*.

SLIDELL, J. I. "A marriage, contracted out of this State, between persons who afterwards come here to live, (*s'y établir*,) is also subjected to the community of acquets, with respect to such property as is acquired after their arrival." Civil Code, 2370.

Did *Franklin* and his wife live in Louisiana—were they established here, in the true sense of the language used in the code?

We are first to ascertain the true meaning of those expressions, and then apply them to the facts of the case.

My opinion is, that by these words, we are to understand the domestic domicil, the true and permanent home; that domestic hearth, where the husband and wife have surrounded themselves and their offspring with the comforts of domestic life, and from which, when he and his wife occasionally depart, for the purposes of business or pleasure, they do so with the intention to return.

I acknowledge, that when I attempt to apply these principles to the conflicting testimony in this cause, there is some difficulty. My first impression, at the oral argument, was rather in favor of *Mrs. Acklen's* pretensions. But, on carefully perusing the evidence, after stripping the case of the difficulties which the untruthfulness of *Franklin*, in his public acts and declarations, has thrown around it, and endeavoring to ascertain the true intention, the true circumstances, the true acts, which ought to control this question, my mind has been brought to the conclusion, that the true, fixed, and permanent home of the husband and wife was in Tennessee; and that Louisiana was, both to himself and his wife, after their marriage, a temporary resort, for the purposes of business and pleasure. I consider Louisiana their transitory residence, for those purposes, during a portion of the year, and Tennessee their home.

In coming to this conclusion upon this mixed question of law and fact, I have been influenced by the well-settled legal principle, that where there is doubt upon such a question, the original home is to be considered the true home.

I therefore conclude, that between *Franklin* and his wife, the community of acquets did not exist.

II. With regard to the bequest to his brothers and their heirs, forever, in trust, of certain property, the revenues to be employed in establishing and maintaining an academy in Tennessee, to be superintended by the magistrates of Sumner county, and their successors in office, as particularly set forth in the will, to

**SUCCESSION OF** which I refer for a more full exhibition of the terms and nature of the bequest.  
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I am clearly of opinion, and was so from my first perusal of the will, that said bequest is void, so far as concerns the immovables in Louisiana.

I consider it as establishing a tenure of property unknown to our laws, highly inconsistent with their spirit, creating an entail, and, substantially, involving, in a very aggravated form, prohibited *fidei commissum* and substitution.

I will observe, that it is not pretended that the testator ever had the idea of conferring a benefit upon his brothers, to whom he gave what, in the language of a foreign jurisprudence, with reference to which the will was framed, would be called the legal estate. This point has been satisfactorily discussed in the opinion of Mr. Justice Roet, and I do not think it necessary to enlarge upon it.

For the above reasons, and referring to the views of Mr. Justice Roet, in which, mainly, I concur, for an ample discussion of the law and facts, I accede to the decree prepared by him.

**EUSTIS, C. J.** After a very careful examination of the testimony concerning the place where *Franklin* must be held as having lived, in the sense of the code, I concur in opinion with Justices Roet and Slidell.

In relation to the validity of the trust estate attempted to be established by the will, I scarcely consider the question as an open one, in the present state of our jurisprudence; and I consider the argument in their favor, as a proposition to make an entire innovation in the law of titles to real property, and to introduce the English trust estate, in opposition to the positive prohibition of the code and the established jurisprudence on that subject.

In the prohibition of the code of 1808, which has remained unchanged by that of 1825, I think the most general and comprehensive terms which the legislator considered appropriate, have been made use of. At the commencement of the dominion of the United States in Louisiana, some of the lawyers from the old States were disposed to introduce here the system of laws with which they were familiar. It was natural for them to prefer a change which would enable them at once to make available what they had already acquired, to the toil of learning a system with which they were unacquainted, and which presented the additional difficulty of being in a foreign language. Efforts were not spared by this portion of the profession to introduce the common law, as it has been since introduced and prevails in the other States, whose territory formerly belonged to France and Spain.

But of the members of the bar conversant with the common law, the most eminent did not favor its introduction as a general system, and the consequent exclusion of the civil law. In relation to public and personal rights in criminal proceedings, in commercial and maritime cases, the laws of Louisiana were assimilated to those of the other States; but, in relation to real property, and its tenures, the common law or the English equity system has never had place in Louisiana.

The views of these distinguished men, reflecting the evident sense of the people, were impressed on the legislation of the State. The subject was deemed of such moment, that it was not trusted to ordinary legislation; and hence the provisions, in both the Constitutions of 1812 and 1845, which prohibit the introduction of any system of laws by general reference.

In this condition of opinion, the codes of 1808 and 1825 were prepared and enacted. The prohibition certainly embraced the substitutions and *fidei commissas* of the Roman, the French and the Spanish laws. Strange, indeed, would it be if the prohibition, embracing all these, should exclude the English trusts



and retainders, with all their train of intricate and, except to the initiated, unintelligible modes and distinctions. SUCCESSION OF  
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This prohibition was established from policy, in the interest of public order, for the purpose of preserving the simplicity of titles, which were all allodial, and which it was for the interest of society to maintain in their plain and intelligible form.

The terms made use of being thus general, the object of the legislator being known, a construction which would defeat its salutary purpose, is not to be given to it; and such a construction never has been given to it, to my knowledge.

Let us suppose at the time, the question had been put to the legislative council which enacted, or the juriconsults who prepared, the code of 1808, or to the governor under whose authority it was made, whether the English trusts, executory devises, and the appurtenant jurisprudence was excluded from this prohibition, and were to be introduced into the titles to real property, can a doubt exist as to what would have been the answer? But did the term, *fidei commissa*, in its general sense, include trusts? Was it so intended, and was it so used in the prohibitive clause by the legislator?

Kent says, "A use is where the use of land is in A. in trust; that B shall take the profits, and that A will make and execute estates according to the direction of B."

"In examining the history of uses, we shall find that they existed in the Roman law, under the name of *fidei commissa*, or trusts," vol. 4, p. 269.

Uses and trusts are, in their original, of a nature very similar, or rather exactly the same, answering more to the *fidei commissum* than the *usus fructus* of the civil law. 2 Blackstone, 327.

If the word *fidei commissa* was used in the sense in which the learned commentators used it, it must be considered synonymous with the word trusts. Indeed, it cannot be believed that all trusts were prohibited by the code except English trusts, and that the most obnoxious of all titles, from its complicity and origin, were exempted from this sweeping prohibition and allowed to have a place among the tenures of real property.

It is true that the English trust estate did not exist under the Roman law; it had its origin at another period; but it can be assigned to no place under that system of jurisprudence except as a *fidei commissum*, in its general sense. In its features it certainly most resembles an usufruct, but it is not one, it wants many of the essential requisites of that title.

A trust, as attempted to be created by this will, is a right in equity to the beneficial enjoyment of lands and slaves, of which the legal title remains vested in some other person.

That *fidei commissa* was held to mean trusts, has, I think, been uniformly held by our courts.

In *Mathurin v. Livaudais*, the testator had a son who was a slave, and he bequeathed a sum of money to the master as a part of the price of his emancipation. This legacy was attacked on the allegation of its being a *fidei commissum*. The court said, "Our code declares that substitutions and *fidei commissa* are abolished." But the object of this jurisprudence was, as it is well known, to prevent property from being tied up for a length of time in the hands of individuals and placed out of the reach of commerce.

The framers of our code never contemplated to abolish naked trusts, uncoupled with an interest, which were to be executed immediately. If they had, they

**SUCCESSION OF FRANKLIN.** would not have provided, in a subsequent part of the work, for testamentary executors, described their duties and recognized the validity of their acts. The obligation imposed on the legatee, by the acts of the testator, cannot be distinguished from that of the executor, except in name. 5 M. R. 302. Judge Martin, in delivering the opinion of the court in the case of *Clague v. Clague*, in a clause of a will by which the executors were directed to retain the property of the succession until the majority of the testator's children, says: "Such a disposition is indeed a *fidei commissum* or trust, which the law forbids."

I do not deem it important to refer to any other decisions on this point, because I have no knowledge of any trust estate, created under the laws of this State, nor of any case in which the legality of such an estate has ever been recognized by our courts.

There are cases in which assignments of insolvents, residing out of the State, have been recognized, and foreign assignees, syndics and mandatories have been permitted to sue for and recover property to which they were entitled, for the benefit of creditors. There are certain testamentary trusts, which so far from being prohibited, are expressly recognized by the code, and are absolutely necessary in order to carry into effect the lawful dispositions of testators.

But I am not aware of any trust estate created in Louisiana, which has been recognized as a legal tenure, adversely to third persons having an interest. Of the difficulty of dealing with this description of title, which has sometimes been under adjudication, or deeds of trust made out of the State, some idea may be formed by referring to the cases of *Ricks v. Goodrich*, 3 Ann. 212. *Hayden v. Null*, 4 Ann. 65. *Gaulden v. McPhaul*, 4 Ann. 79.

Mr. Justice McLean, the organ of the Supreme Court of the United States, in the case of *Gaines v. Chew*, 2 Howards' Reports 650, so understood the jurisprudence of this State. After quoting the article 1507, he says, "This abolishes express trusts," &c.

I feel at liberty to avail myself of the labors of the distinguished jurisconsults, whose *memoire* has been submitted to us in the case of *McDonogh's* will, now under advisement, and to add to my humble convictions, the well deserved weight of their learning and eminent position in the science of jurisprudence. I say, I feel myself at liberty, because their opinion on this point has no connection with anything at all questionable, which is to be decided in that case, in the judgment of any of the judges; otherwise, however strong the temptation to secure such aid, my duty would require me not to adopt it on this occasion. These learned gentlemen say, "To us, this word *fidei commissa* appears to have been added to the article 896 of the French Civil Code, in the article 1507 of the Louisiana Code, in consequence of the English origin of the other States of the Union, and to prohibit, at the sametime, as much the substitutions of the old French law, as the trusts of the English law."

I am under the conviction, that the right which a man has to dispose of his property by will, to take effect after his death, is derived exclusively from the law of the land, which has established this right as an incident to the right of property. The law has, code 476, ordained certain forms, and imposed certain conditions on this species of alienation, which are essential to its validity. Code 1453. A man has no more power to create new or prohibited modes of property, in the exercise of his right to make a will, than he has in a sale or a donation *inter vivos*. Between parties, they may hold their property by any tenure or terms they please; but as to the establishment of titles effecting the property

itself, there is no power in man out of the law. Nor has society any interest in attempting to carry into effect the conceits of the dead, to the disturbance of the rules of public order and policy, which regulate the living. SUCCESSION OF  
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I am, under this conviction, relieved from the necessity of entering into any other considerations, than those which the law holds as controlling the effect to be given to this will.

It is contended in argument, that the article 1506 of the code, is to be applied to the testamentary disposition under consideration. That article provides, that in all dispositions *inter vivos* and *causa mortis*, impossible conditions, and those which are contrary to the laws or to morals, are reputed not written.

I do not understand this article as applicable to this disposition. It is not conditional. The title it creates is absolute—a *trust estate*. The trust may, by inference, be called a condition, but the trust is of the essence of the title, and I consider the title not as a conditional one, but as an impossible title. I think it would be a forced and inadmissible construction to give such an application to this article. I have found no authority which would support it.

This testamentary disposition, I conceive, confers no ownership on the legatees, and the court must hold it to be inoperative and of no effect.

Having come to this conclusion, it only remains for me to state my concurrence in the decree prepared by Mr. Justice Rost.

PRESTON, J., dissenting. *Isaac Franklin* was known in Louisiana upwards of twenty years ago, as a dealer in slaves. He amassed a very large fortune. He then became a most extensive planter, in West Feliciana. He also had a large farm in Tennessee, and lands in the States of Mississippi and Texas.

In July, 1839, he married *Adelicia Hayes*, in Nashville, by which marriage he had three children, who survived him. He died on the — day of April, 1846, in the parish of West Feliciana, where his succession was opened. His will, dated the 24th day of May, 1841, was duly proved, his executors were qualified, and inventories made of his property. Shortly after his death, two of his children also died. Inventories were made of their respective interests in his succession, and also of the community of acquets which existed between him and his surviving widow.

*Mrs. Franklin*, on the 12th of Dec., 1846, by an act before a notary public, for considerations expressed in her late husband's will, renounced the community of acquets in these words: "She does, by these presents, accept the said will, and consents to be bound by the same, with all its conditions, and does hereby renounce, relinquish and abandon all rights of community dower, by the courtesy or otherwise, by the laws of Louisiana, Tennessee, or other States, where the property of said *Franklin* may be situated, that she may be entitled to according to the laws of said several States."

The deceased, by his will, made some particular legacies. He made ample provision for the support of his widow, and gave her a hundred thousand dollars, or an annuity of six thousand dollars, during her life, as she might choose, in case of her second marriage, for the support of herself and children of such marriage. After these particular legacies, he divided two-thirds of his estate to his children, and the remaining third to establish a seminary of learning in Sumner county in the State of Tennessee.

In May, 1849, *Mrs. Franklin* married *Col. Joseph A. S. Acklen*. In January, 1850, she, authorized by her husband, declared, before a notary, that she elected to take, under the will of her late husband, one hundred thousand dol-

SUCCESSION OF Mrs. with six per cent per annum interest, in full of all her rights of dower, or any other rights, which she had upon the succession of her late husband.

In December, 1847, the state of Tennessee incorporated the literary institution founded by *Franklin*, in Sumner county, under the name of "Isaac Franklin Institute," and gave it full powers to receive and administer the bequest for the purposes prescribed by the will.

Out of these leading facts, ramified into much detail, a great deal of intricate legislation has arisen between the parties interested. However, but four main questions have been submitted for our consideration, and have been argued with great ability.

1. Whether *Isaac Franklin*, at the date of his marriage, and at that of his death, or at any intervening time, resided in Louisiana; and consequently, whether a community of property existed between him and his wife, and what effect his residence in Louisiana produces on the devises of personal property left by him at his decease.

2. Whether *Mrs. Acklen* is bound in law by the several acts of renunciation of community, executed by her after her husband's death; or, whether the evidence establishes the execution of those acts to have been induced by such misrepresentation, and founded on such error of law and fact, as entitled her to demand that the acts of renunciation be set aside and annulled.

3. Whether any part of the particular legacies left by the deceased, ought to be paid out of the portion accruing to the forced heirs.

4. And mainly, whether, by the terms of the will of *Isaac Franklin*, the bequest to the trustees contains a substitution or *fidei commissum*, or any other disposition of his property, which, even if not imputed actually written, the definition of either is still null and void, as being in opposition to the whole policy of our law.

The district court has decided all these questions in favor of *Mrs. Acklen* and her minor child. The trustees of the "Isaac Franklin Institute" have appealed.

The views I have taken of other parts of this case, render the inquiry whether *Isaac Franklin* was a citizen and resident of Louisiana, or of Tennessee, at the time of his marriage and death, not so important as it has been regarded by the adverse counsel. But, as it has some bearing upon my opinion, I am obliged to give my reasons for maintaining the decision of the district court.

It is a mere question of fact, and I think the evidence greatly preponderates in favor of the judgment of the district judge. As the judge resided in the same parish with him; was intimate with him; was called as a witness to his will, when made, and to prove it at his death—it is a question of fact, on which, peculiarly, I would submit to his decision, even if I thought the evidence doubtful. But it leaves no doubt on my mind of the correctness of his decision on this question of fact.

For a quarter of a century, *Franklin* was known in this city and State as a trader in slaves, and laid the foundation of his vast fortune in this State by that business.

It being known that the population and improvement of Louisiana was to be achieved in a great measure by emigration, the old, as well as the new Constitution of the State prescribed, that the Legislature shall "prescribe the manner in which a man coming into the State, shall declare his residence." Sec. 12. In pursuance of this clause in the Constitution, the General Assembly, in 1816, prescribed by law: "That an individual coming into the State from any other State of the United States, and desirous of acquiring residence therein, shall

give notice, in writing, to the judge of the parish where he proposes to reside, of his intention to acquire residence." Additional facilities were given by law, passed in 1818, but the act quoted was never repealed. SUCCESSION OF FRANKLIN.

In pursuance of it, on the 28th of February, 1832, *Franklin* presented the following petition, on which he obtained the order annexed, both certified in this suit to be true copies of the record of the court in which they were filed :

"To the Honorable Charles Maurian, Judge of the Parish Court for the parish and city of New Orleans: The petition of *Isaac Franklin* shows, that he is a resident of the State of Tennessee, and that it is now his intention to become a resident of the city of New Orleans and State of Louisiana, and to vacate and cease his domicile in the State of Tennessee. He therefore makes this his declaration of his change of domicile, and prays the same be registered, and a certificate given him according to law. ISAAC FRANKLIN."

*Order.*—"Let the within declaration be filed in the Clerk's office, and a copy thereof be delivered to the person making the declaration.

"New Orleans, 28th, February, 1832. CHARLES MAURIAN, Judge."

This declaration made in pursuance of the Constitution and law of the State, was conclusive of his will and intention to become a citizen and resident of Louisiana. If, as contended, this was done merely to facilitate his business of trading in slaves, it may be answered, that a leading object of all in acquiring a residence in our State is, to facilitate their business, whether it be commercial, agricultural or mechanical.

But, did he follow up his declaration of residence in our State by acts evincing the reality of his intentions? In May, 1835, he purchased the undivided half of near eight thousand acres of land, in West Feliciana, upwards of two hundred slaves, and all the stock necessary for the immense plantation; and immediately formed a copartnership with a resident of the parish, for the purpose of carrying on, as it was expressed, "the business of planting, upon several plantations situated in the parish." It was to continue until March, 1840. In the notarial act, he is described, in pursuance of his declaration, as of New Orleans. In numerous acts, suits and exceptions, from that period until 1840, he describes himself as domiciliated and a resident of New Orleans. He was married in Tennessee, in July, 1839. But a few months before, in a notarial act, passed in Concordia, he described himself as "of the city and parish of Orleans," and about six months before, formally excepted to a suit filed against him in the parish of West Feliciana, "that the legal domicile of this respondent is in this State, in the city and parish of New Orleans. Our code formally declares, that "a married woman has no other domicile than that of her husband." Art. 48. It is so notorious, that our laws are so much more favorable to married women than those of the State of Tennessee, that it cannot be doubted *Mrs. Franklin* and her friends considered this, in contracting her marriage, and had a right to avail herself of the advantages of our laws, unless his heirs and legatees could show conclusively, that all this was fiction, or that he afterwards, in truth and reality, removed with her to Tennessee, and remained there till his death.

Now, so far from afterwards removing to Tennessee, as early as 1842, he had removed to West Feliciana, where he had become the undivided proprietor of the vast plantations in which he was before interested—had accumulated together more than five-sixths of his colossal fortune, in immovable property, and where, I have no doubt, his heart was as immovably fixed.

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He afterwards avowed, judicially and in public acts, his residence in that parish. But two months before his death, in a notarial act, passed in New Orleans, he described himself as "of the parish of West Feliciana."

He exercised all the political and parochial rights of a citizen, in that parish. His votes were challenged; he satisfied the commissioners, and exercised the right of suffrage. The commissioners of election were liable to indictment, conviction and punishment, for allowing him to vote without evidence of his right of suffrage. Bul. and Cur. Dig. 393. The evidence which it was their sworn duty to take and receive, was his own oath as to his residence; and if he swore falsely, he was liable to the pains and penalties for perjury. Bul. and Cur. 398. Upon the challenge, I cannot doubt that the commissioners did their duty, and that *Franklin* swore the truth; and yet he voted.

It is the sacred duty of his surviving wife to maintain the integrity of these acts; and she should not be divested of rights based upon them without overwhelming evidence.

On the other hand, it is shown, that *Franklin* voted twice, in 1841 and 1843 in Tennessee. Their laws are much less rigorous than ours on the subject of illegal voting, and but six months residence and citizenship of the United States, is required to exercise the right of suffrage. His last vote was in Louisiana. He instituted a suit in the Federal Court of this circuit, as a citizen of Tennessee. It is proved by his own declaration, that it was colorable only to obtain an advantage in a particular case. No one who has an adverse interest, should suffer from these illegal acts.

It is proved, that he had a large and elegant farm in Tennessee, with a hundred slaves, improved with all the conveniences for a residence. The impression on my mind, from the whole evidence, is, that he kept up that farm as an appendage to his immense estates in Louisiana, and as a summer retreat, which he visited, rather than inhabited, in his western and northern excursions. It is certain, that in writing, with the familiarity and confidence of a son-in-law, to the esteemed father of his wife, when returning down the river from Fairview to Belleview, he said, "we are all well and will be at home to-morrow." And, but a few months before his death, as to Fairview, "I will be compelled to break up that whole establishment. If I do not change my mind, I will take the greater part of the hands off next fall, and put them on some of my lands in Louisiana. They give me more trouble than all my other property."

It is proved, by the manager of his estates in Louisiana, that he kept fine furniture in the residence exclusively used by him, on his Belleview plantation, and never moved it. That for two years before his death, he frequently spoke of building a new house, raising a mound and erecting a fine residence to gratify his pride; that he selected the spot, and carpenter to build it, and commenced the cabins, and that one object was, to educate his children at home by private tutors.

The community of acquets has never been a favorite system with me; but since it is the law of Louisiana, I would as soon think of depriving the wives of our wealthy citizens of its advantages, because they are able to keep and to retire from the toil of business, a few months in the summer, to their fine houses at the Bay of St. Louis or Pass Christian, as to pronounce that *Franklin* deprived his widow of the community of acquets, by his summer establishment in Tennessee. The tenure of the wife to the community, would be feeble indeed, if, after toiling with the husband three-fourths of the year, with

all the self-sacrifices by which fortune is made on our plantations, the husband might deprive her of it by a summer retreat from home for a few months in the year. SUCCESSION OF  
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I have no doubt, therefore, that *Isaac Franklin* was a citizen of Louisiana when he contracted matrimony, in July, 1839; and that Louisiana was his place of residence when he died, on the 26th of April, 1846; and, therefore, that a community of acquets existed between him and his wife from their marriage, until it was dissolved by death. But that community no longer exists.

By his will, he gave *Mrs. Franklin* the property she received from her father, with the increase of the same.

He gave her his household furniture and supplies on his plantation in Tennessee. He gave her out of the revenues of his plantation, what she might deem necessary to support her and his children, and to educate them in the best style. He gave her the use of his Fairview plantation, and all that was on it, while she remained unmarried.

And in lieu of it, in case of a second marriage, one hundred thousand dollars, or an annuity, at her election, of six thousand dollars per annum. He gave this large sum to his executors, in trust, for her separate use and maintenance, and that of any children she might have by her second marriage. It was given, however, in full payment "of all her rights of dower or any other rights she might have on his estate."

From the whole tenor of his will, the anxiety manifested to improve and enlarge his plantations, to increase the number of slaves upon them, and state the positive injunction to his executors, to purchase in his plantations and slaves, if from any cause or for any purpose, their sale should be ordered by a court, I have no doubt the donation was made as it purports to be, in full of all rights (including, in my opinion, community rights) upon his estates, that they might be kept indivisible during the minority of his children, in order to place each in possession of a splendid plantation, as they arrived at the age of majority.

The terms of the bequest clearly show this intention and understanding of them as to *Franklin*: "it shall be in full for all her rights of dower, and any other rights she may have on my estate." That this was the understanding of the testator, no one can doubt. For in Tennessee, Mississippi and Texas, she could only have the right of dower on his estates. And the terms, any other rights, to which full effect and meaning must be given, could alone refer to her matrimonial rights on his estate by the laws of Louisiana.

As *Franklin* understood it, so did his widow and her advisers. For, by an act before a notary, made with his executor eight months after his death, she declared, that "she is desirous by these presents, to express her solemn intention for herself and her heirs, to accept each item and all the provisions and stipulations contained in the last will and testament of her beloved husband; and because of provisions made for her on certain contingencies, stated in the will, and in order to comply with the intentions of her deceased husband as manifested in his will. For these purposes, and in consideration of his bequests and of the benefits and advantages she will derive by taking and adopting the will, she does by these presents, accept the will, and consent to be bound by the same, with all its conditions, and does hereby renounce, relinquish, and abandon all rights of community dower, by the courtesy or otherwise, by the laws of Louisiana, Tennessee, or other States, where this property may be situated, that she may be entitled to, according to the laws of those States."

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Again, about a year after the death of her husband, reciting specially the property belonging to the community of acquets and gains, which had been inventoried and claimed for her, she ratified before a notary public the renunciation of the community, she had made, in accepting a sum of ten thousand dollars a year, allowed by the will for her support during her widowhood, in lieu of that community. And, as he had given her, further, the use and enjoyment of his Fairview plantation during widowhood, as another consideration for her matrimonial rights, by another notarial act, made about eighteen months after the death of her husband, she renounced that use and enjoyment in favor of "the Isaac Franklin Institute," for the sum of thirty thousand dollars, expressly declaring, that she received it also in consideration of the renunciation of her community and other rights.

And here it is proper further to observe, that *Mrs. Franklin*, having contracted a second marriage, in 1849, she, on the 9th of Jan. 1850, with her husband, elected, by an act before a notary public, to take the hundred thousand dollars instead of the annuity of six thousand dollars, and accepted it in full of all the rights of dower and any other rights she might have upon the succession of her late husband. As it is clear to my mind, that *Franklin* gave this large sum in satisfaction of the community of acquets, under the expression of "all other rights," and to prevent the division of his estates by that or other matrimonial rights, I think she should be compelled to receive it for the consideration for which it was given, according to the understanding of her first husband and herself, until her second marriage, and not according to her present understanding.

*Mrs. Acklen* contends, that the three acts by which she renounced the community of acquets, should be annulled, because made under errors of law and fact. 1. That at the time she renounced, she was deceived as to the extent of the community of acquets, by which she has been greatly injured. I do not think she was deceived. The effects of the community were inventoried minutely, and as accurately as the nature of the case admitted, and was fairly appraised and exhibited to her and even copied into one of the acts she signed. In the next place, I do not think she has been injured by her acts. She has received, under the acts, in consideration of her renunciations, \$130,000. The evidence does not satisfy me, that *Franklin* increased his fortune more than \$260,000 during the last seven years of his life, while the community of acquets was in existence.

The acts were made while doubts existed whether she was entitled to any community of acquets at all, and which doubts still exist, as appears by the division of opinion of this court on that subject, and were, therefore, made by way of compromise, and might be considered irrevocable on that account.

The motives expressed in the acts, to carry out and accomplish the wishes of an affectionate husband, of a highly useful and benevolent character, he having made a splendid provision for her of what she chose if she remained a widow, and one hundred thousand dollars if she married again, should have great weight in the consideration of this part of the subject. As other than pecuniary considerations, a respect for the memory of such a husband, operated upon her in accepting his will. She is not to be permitted, for pecuniary considerations alone, to disturb rights vested upon that acceptance of the will and renunciation of her community.

It is urged, that she was deceived as to the amount she was to receive, by inheritance, from her two deceased children, it being represented that she was



to receive twice as much as the law allowed her. If this opinion had been correct, she would have received back a little more of what she renounced than the law gives her. She would have received it from her surviving child. It would have been so inconsiderable, and the source from which she was to receive it was of such a character, that I cannot believe it operated at all on her mind. - Beside, her right to only a fourth of the successions of her children, being a textual provision of our law, which the notary or any citizen could have stated to her, it is probable she knew the extent of her rights, in this respect, before she signed the acts. The counsel who inadvertently mistook her right in this respect, was not present when the first act of renunciation of her community of acquets was made. It was made in New Orleans, before an intelligent and careful notary. She was surrounded by intelligent friends, who had every possible means of knowing what is familiar to all. I cannot believe that the inadvertance of her former counsel, in a letter to her father, on this subject, some time before her renunciation, had the least influence on her mind.

It is said she was made to believe, that claiming her share of the community would be dissenting from the will of her husband, and, in that event, she could not claim the legacies made to her, and especially the legacy of one hundred thousand dollars in case of her second marriage. I have hastily given my reasons for believing this advice to have been correct. She never can take the hundred thousand dollars bequeathed to her, and claim any matrimonial rights from her late husband's estate, of any kind whatsoever.

I cannot see, in the whole evidence, any reason whatsoever for annulling settlements, made in the most formal and solemn manner, by a lady who has enjoyed the best opportunities of having improved her own mind, and no doubt fully availed herself of them, aided by a most intelligent father, and able and careful counsel, hosts of the best and ablest friends, on account of errors, either of law or fact, which do not clearly appear to have existed, or to have influenced her : and thereby throwing the whole succession, thus happily settled, open again to endless litigation, between a mother and her child, some dozen years hence, when the child marries or arrives at the age of maturity, or even with the instituted heir of a benevolent and affectionate husband.

The next point in controversy between the parties is, whether any part of the special legacies, left by the deceased, ought to be paid out of the portion accruing to the forced heirs.

The children of *Franklin* were the forced heirs of two-thirds of his property, of which the father could not deprive them. Code, 1482. Property, in the sense of this article, means his succession; and the succession is the transmission of the rights and obligations of the deceased to his heirs. Code, 867. Two-thirds of his rights were transmitted to his heirs, with no other duty than to pay two-thirds of his obligations. The aggregate of his donations, therefore, could amount to but one-third of his rights, with the duty of discharging one-third of his obligations. The point submitted, therefore, seems hardly to admit of a controversy, and requires us only to recur to these definitions. The article 1703 of the code is express, that no checks or conditions can be imposed on the legitimate portion of the forced heirs.

But, inasmuch as all the sums paid to *Mrs. Acklen*, were given in lieu and compromise of her share in the community of acquets, right of dower and other rights, upon the estate of her husband, they must be deducted out of the general estate, as claims against it, and not out of the disposable portion.

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I think the real and personal property of *Franklin*, wherever situated, belongs to his succession, and must be considered in determining the amount of the disposable portion. And, if it should become important in the settlement of the estate, I have no doubt that the whole of her personal property must be considered as belonging to the place of his domicile, and must be governed and distributed according to our laws.

By far the most important question is the fourth and last. The appellants maintain, that the dispositions in the will of *Isaac Franklin*, establishing a seminary of learning in Sumner county, in the State of Tennessee, are valid to the extent of the portion of his property, of which he had a right, by law, to dispose. His late widow, on behalf of herself and child, contends that those dispositions to establish a seminary of learning in Tennessee, are null and void, because they contain substitutions and *fidei commissa*, reprobated by law, and, if not embraced technically within the definition of either, are yet in opposition to the whole policy of our law. They therefore claim the whole property bequeathed to the seminary.

I am of opinion that the dispositions in favor of the institution, do not contain substitutions or *fidei commissa* reprobated by law, and that so far from being opposed to the whole policy of our laws, that they are most highly favored by our laws, as they are by the jurisprudence of every other civilized State or country with which I am acquainted.

In considering this subject, I will take for granted, that a testator, in Louisiana, can make every disposition of the property acquired by his industry and economy, or good fortune, by donations *mortis causa* which he could make by donations *inter vivos*. It is the greatest inducement of man to industry and economy, and to seek good fortune, to permit him to give that, which is his own, to the objects which he deems most useful.

Individual industry, economy and energy in conquering fortune, result in the general welfare and prosperity of society. The interest of society is thus promoted by allowing to man the free disposal of his property. And it seems to me to be the corresponding duty of society to gratify him with the only earthly consolation he can enjoy in death, the confidence in society, in her laws and tribunals, that the property accumulated by the toil and self-denial of his life, shall be sacredly appropriated, according to his will, to the objects dearest to his heart, and most approved by his judgment.

The code fully authorizes a testator to dispose of his whole property unless restrained by law. Individual interest has added another very indefinite restraining power called "the whole policy of the law," as to which there must necessarily be great varieties of opinion, and which merits, therefore, but little consideration.

By an act of the General Assembly, approved the 25th of March, 1828, "all the civil laws which were in force before the promulgation of the Civil Code of 1825, were abrogated." Unless, therefore, an article of that code or a statute can be presented to me, which prohibits a testamentary disposition, or with which it is manifestly inconsistent, (as, for example, articles enforcing morality and duty.) I shall consider the testamentary disposition valid, and carry it into effect if possible. And, in doing so, will, in pursuance of art. 1706 of the code, interpret the disposition in the sense in which it can have effect, rather than in that in which it can have none.

I find in our code but a single restriction upon dispositions in favor of a stranger, and that is, when the laws of his country prohibit similar dispositions

from being made in favor of a citizen of this State. Art. 1477. There is no prohibition of a disposition in favor of a foreign State, or corporation, created by it. If a citizen of Louisiana choose to bequeath his property to the Emperor of China, there is no law in our code to prevent it. Would you allow a despotic sovereign, it will be asked, to own and manage property in Louisiana? Certainly, until the equally sovereign State of Louisiana prohibits it by law. And the danger of the existing freedom from restraint, in this respect, is just as imaginary as the dangers so much insisted upon in the argument of this case, of tying up property, bequeathed to a literary institution, from commerce. When either becomes a real, and not an imaginary evil, the sovereign Legislature of Louisiana will readily apply the proper remedy, a prohibition by law. In the mean time, it is not for the courts to imagine danger which does not exist, and make laws, destructive of freedom and right, to prevent the unreal evil.

I know, too, as a judge, that the State of Tennessee has not prohibited by law her citizens from making bequests in favor of citizens of Louisiana. And if she had, or art. 1477 of our code was intended, by way of retaliation, to prohibit our citizens from making donations *mortis causa* to citizens of Tennessee, in my opinion both laws would be void, as conflicting with the 2d sect. of the 4th art. of the Constitution of the United States, guaranteeing to the citizens of each State all the privileges of citizens of the several States.

There is nothing in the suggestion, that colored citizens of other States might have rights, forbidden by our laws, under this view of the Constitution. Principles of law are to be illustrated by ordinary, not by extreme suppositions. I have always doubted whether colored persons could be citizens of a State, and much more, that they can be citizens of the United States, for whom alone the Constitution of the United States was adopted. I am aware that the courts, *ampliore jurisdictione*, have held them citizens. A mere suggestion, immaterial to this case, does not render it necessary to refute such decisions.

It has been pressed upon the court, that property in Louisiana can only be bequeathed to a legatee in being at the death of the testator, and then capable of accepting the legacy. The late *Alexander Milne* devised half his large estate to create and establish two charitable institutions in this city. It was done under our advice, as his confidential counsel, that he had power to bequeath any part of his estate to a charitable corporation, to be created after his death, if the Legislature would seasonably incorporate the charitable institutions. I based my advice upon the opinion, that the provisions of our code, relied upon to the contrary, and requiring a capacity to receive, at the opening of the succession, were applicable, in terms and spirit, to natural persons alone, and not to establishments of public utility; that there was nothing in the code which prohibited the creation of such establishments by will; that they were thus created in all countries, and greatly favored by modern philanthropy; and, that it could not be otherwise in Louisiana. As to the notion, that the fee of real property could not be in abeyance, but must vest, at the death of the testator; that the title must pass out of the deceased with the breath of the body, to an existing heir. Had I been deluded, like many lawyers, with that unmeaning jargon of words, which, without thinking for ourselves, we take for granted, represents necessary realities, until I carefully perused the opinion of the Supreme Court of the United States, in the case of *Inglis v. The Sailors' Snug Harbor of New York*, 3 Peters, 112.

The conclusions of the court, in that case, seem to meet every objection to *Franklin's* bequest, as to the point under consideration, as it supported the decision as to *Milne's* will. The court say, "if the first mode, pointed out by the

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SUCCESSION OF testator, for carrying into execution his will and intention with respect to this fund, cannot legally take effect, it must be rejected, and the will stand as if it had never been inserted; and the devise would then be to a corporation to be created by the Legislature, composed of the several officers designated in the will as trustees, to take the estate and execute the trust," pp. 114, 115.

The opinion in support of this position was the production of such men as Thompson, Marshall, McLean, and Baldwin, then on the Supreme Bench. It is true, the most learned member of the bench delivered an able dissenting opinion, collected from the learning of antiquity. The more I have read his works, the more I have found that he substituted the learning of books, almost exclusively, for the study of men and things, the worst species of substitution in my opinion.

The decision of the court satisfied me that a testator could create an establishment of public utility by will, and if the sovereign power assented, the bequest would be effectual against his heirs before the courts of any country that had thrown off the shackles of mere terms, and looked, with the wisdom of modern civilization and philanthropy, at things. I therefore advised that old gentleman to venture half his fortune on the faith of that decision, in establishing asylums bearing his name.

Being at the time a member of the General Assembly, and acting under as high obligations in that capacity as these imposed upon me in my present situation, I prepared acts of incorporation of the Milne Asylums, and had them passed through that body, without a dissenting voice, at the next session after the death of the testator.

Those institutions were destined to encounter the most powerful attacks by distinguished counsel on behalf of the heirs of *Milne*, on account of their non-existence at his decease. Those efforts were successfully resisted, and the validity of the bequests, though the donees were not in existence at the death of the testator, was established by the late Supreme Court, in an opinion marked by great ability and unanswerable truth. They based their opinion upon the powerful reasons given by the Supreme Court of the United States, in the case of *Inglis v. The Trustees of the Sailors' Snugharbor of New York*. Of the correctness of that able opinion I never entertained a doubt, and to this day subscribe to every sentence it contains.

The great argument in opposition to the Milne Asylums, and of course to the establishment of the seminary of learning in Tennessee, by the will of *Franklin*, is, that the bequests were void, because the institutions were not in existence at the time of the death of the testators. The objection was overruled in the succession of *Milne*; but the correctness of the decision is still zealously and vehemently assailed. It is urged that the general rule is, that the legatee must be *in esse* when the succession is opened, and that, therefore, it is incumbent on the appellants to show that the law makes an exception in favor of the validity of the bequest in controversy. Besides the cases already referred to, the authorities are abundant, that the exception exists in England. Many are collected in the very able argument of Mr. Binney, in support of the will of *Stephen Girard*.

In my opinion, the exception had its origin in the civil law, long before the English customary law was reduced to a regular system of jurisprudence. Without examining minutely the Roman law on this subject, I shall content myself by quoting a short paragraph from the celebrated compendium of Mackeldy, a work universally admitted to be distinguished for its accuracy and soundness of doctrine. In the 145th paragraph of the general part of his work, he says: "The term

*pia causa*, denotes an institution for pious and charitable purposes, or for the public benefit, and is the general name given to every establishment which has for its object the promotion of piety, the relief of necessitous persons, the spread of education, or the advancement of science and the arts. Institutions of this kind are to be regarded as moral persons only, in case they have been recognized as such by the State, by way of approval and confirmation; otherwise, they lack the capacity for rights, and cannot acquire any thing. But the confirmation of them, on the part of the State, may be subsequent to their foundation, and then it has a retrospective effect back to the time of such foundation. If such *pia causa* be confirmed by the State, and thereby recognized as a moral person, it can, not only have rights of all kinds, and make acquisitions *inter vivos* as well as *mortis causa*, but it also enjoys the privileges of minors, as well with respect to *restitutio in integrum*, as concerning the alienation of property.

This exception to the general rule, as thus enunciated by Mackeldy, is not, as has been contended, the mere creature of the statutory laws of Rome; but has its foundation in correct reasoning and the very nature of things. When the lawmaker lays down the general rule relative to the acquisition of rights or property by natural persons, by means of a testamentary disposition, he requires the existence of the legatee or testamentary heir at the time of the death of the testator; for, he who is not in being cannot acquire anything. But, when a testator is desirous of becoming the founder of a charitable or educational institution, he does so on the implied condition, that the State will ratify and confirm his benevolent intentions. If the confirmation is withheld, the will is defeated; but if granted, it operates like the accomplishment of all suspensive conditions, whether express or implied, and has a retroactive effect. The correctness of these views is, I believe, recognized in every system of jurisprudence, both ancient and modern. And I have heard nothing in the argument of this case, to induce me to entertain the slightest doubt of the soundness of the able opinion, rendered in the case of the Milne Asylums.

The General Assembly of this State took the same view of the subject in 1825, in authorizing the parishes of Point Coupée and West Baton Rouge, to accept the legacies of *Julien Poydras*, to endow indigent young girls of those parishes with marriage portions. The parishes had no capacity to receive the donations, at the death of the testator. They were trusts, so much denounced in this case. They were perpetual trusts, the interest alone of the donations to be appropriated to the wishes of the donor. The General Assembly authorized the parish of Point Coupée to accept his donation, to establish an academy. Avarice has never suggested the idea of contesting the noble bequests of *Poydras*. The present situation of his donations differs in no respect from the situation of *Franklin's* bequest, except, that the police jury of Point Coupée are its administrators by authority of the State of Louisiana; the magistrates of Sumner county are the administrators of *Franklin's* bequest, by authority of the State of Tennessee.

So, our Legislature gave powers, by special act, to the city of New Orleans, to accept the bequest of *Stephen Girard* to this city. Powers which, no doubt, the city possessed before, but, as doubts had been suggested to render assurance doubly sure, they were conferred by a special act, thus sanctioning the principle that legacies in favor of corporations do not lapse by the incapacity of the corporation to receive at the death of the testator; but, that the incapacity might be removed retroactively by the sovereign.

The General Assembly of Pennsylvania took the same view of this subject, by enacting a law, immediately after the opening of the will of *Stephen Girard*,

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**SUCCESSION OF FRANKLIN.** that "it shall be lawful for the mayor, aldermen, and citizens of Philadelphia, to exercise all such jurisdiction, enact all such ordinances, and to do and execute all such acts and things whatever, as may be necessary and convenient for the full and entire acceptance, execution, and prosecution of all the devises, bequests, trusts, and provisions, contained in said will." Judge Story drew up the decision of the Supreme Court of the United States, sanctioning the clause in the will establishing the Girard College. On account of his preconceived views, expressed in his dissenting opinion, in the case of the Sailors' Snugharbor, he presented this act in support of the will, only as "a legislative exposition and confirmation of the competency of the corporation to take the property and establish the college." But, if it had become necessary, in support of the bequest, to rely upon the act of the General Assembly alone, I have no more doubt than of my existence, that the Supreme Court of the United States would, as in the case of the Sailors' Snugharbor, have sanctioned the acceptance and execution of the bequest by the city of Philadelphia, under this act of the Legislature alone.

As Judge Story left the matter, the legislative action of a State must have great weight, for I see no difference between the legislative and judicial interpretation of laws and sanction of principles, except in their merit. Each must recommend itself by its intrinsic merit, to the intelligence and reason of man, to command respect and confidence.

In conformity to the principles established in all these cases, the State of Tennessee, being advised of the munificent bequest of one who was born within her limits, to establish a seminary of learning at the place of his nativity, has done all she could to avail herself of that munificence, by incorporating the seminary under the name of "The Isaac Franklin Institute." She gave the corporation, the trustees and superintendents, ample powers to carry out the will of *Franklin*. And, in the preamble to the act, exhibited a remarkable deference to the laws of Louisiana, and the opinions and action of her courts, whatever they might be, and evidently recommended full justice to all interested, and the settlement of all their controversies by compromise.

As the State of New York gave full powers to the trustees of the Sailors' Snugharbor, to carry out the bequest of its founder; and the States of Pennsylvania and Louisiana, to the citizens of Philadelphia and New Orleans, to accept and carry out the will of *Stephen Girard*; and the State of Louisiana to the Milne Asylum to accept and carry out the will of their founder; and to the parishes of Pointe Coupée and West Baton Rouge to carry the noble bequests of *Julian Poydras* into effect, so the sovereign State of Tennessee might incorporate a literary institution, to be established within her limits, and give all the powers necessary to carry out the will of its founder. The fact that the bequest was made by a citizen of Louisiana, and that the largest portion of the property is situated in this State, can make no difference in the eyes of liberal minded men. It can make no difference in the eye of the law, because our code has made no distinction between another State and our own, and foreign and domestic corporations, in this respect.

If the institution had been established in West Feliciana, it would have been maintained, under the decision in favor of the Milne Asylums. Is it to be destroyed because established in a sister State? It is impossible, without an imperative legal prohibition against it.

As already stated, it became necessary, for the widow and heir of *Franklin*, to succeed in this suit, for their counsel to overthrow the solemn opinion of our Supreme Court, in the case of Milne Asylums, guaranteed by the great

decision of the Supreme Court of the United States, in the case of the Sailors' Snug Harbor, and, by what was done, rather than said, by that court, as to the Girard College. And feeling this, the counsel have boldly attacked that decision as a violation of our laws. They have not succeeded, in my opinion. The Milne Asylums, the Sailors' Snug Harbor and the Girard College, remain noble monuments, not only of the munificence of their founders, but of the legislative and judicial wisdom which maintained and carried into effect the benevolent dispositions of their donors. And it is to be hoped, that The Isaac Franklin Institute will remain, during the five hundred years for which it is incorporated, an equally noble monument of wisdom, as well as of benevolence.

It is next contended, that the will of *Isaac Franklin* contains a substitution and a *fidei commissum*, which are prohibited by the 1507th article of the Civil Code. The article is in these words: "Substitutions and *fidei commissum* are, and remain, prohibited. Every disposition by which the donee, the heir, or legatee is charged to preserve for or return a thing to a third person, is null, even with regard to the donee, the substituted heir, or the legatee. In consequence of this article, the trebellianic portion of the civil law is no longer a part of our law."

The authorities quoted in argument, satisfy me that there is no substitution in *Franklin's* will. To constitute a substitution, the donee must be charged to preserve the property until his death, and then return it to the substituted heir or legatee. The substitution supposed in this will is, that *Franklin* gave the third of his property to his brothers, and charged them to preserve and return it to their heirs. I am of opinion that he did not give the property to his brothers or their heirs, but merely appointed them, as trustees, to take charge of and administer it for the seminary of learning in Tennessee. The testator never contemplated, the brothers never construed the will as conveying any right of property to them. The manifest meaning and intent of the whole bequest is, that they, with the magistrates of Sumner county, should manage and superintend the property for the institution, without any beneficial interest in it themselves. This does not constitute a substitution: a term which embraces the ownership, and not the administration of property, and implies that one should hold the property for another during life, and transmit it to him at his death, and is very similar in its effects to the entail of the English law.

A *fidei commissum* is created when property is given to one for another, to vest in the latter, immediately at a given period or upon a condition. I do not think the will contains a *fidei commissum*, because the property was not given by *Franklin* to his brothers, for the literary institution, but was given to the institution itself; and that the title remained in the succession of *Franklin* until the seminary was incorporated.

But, if it be conceded that the title to the property was given to the brothers, for the literary institution, and was to be transmitted only when the institution was created and rendered capable of receiving, a *fidei commissum* was perhaps created, but, in my opinion, one not prohibited by law.

I have long entertained the opinion, that the article 1507 of our Civil Code, when adopted in the Code of 1808, was not intended to introduce new principles of law into Louisiana, but merely recognized the existing law at the time; and that no other than substitutions and *fidei commissum*, previously unlawful, were prohibited by it. The argument of this and other causes, lately, have confirmed me in this opinion.

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The digest prepared in 1808, was adopted as a digest of the civil laws then in force in the Territory of Orleans, with alterations and amendments adapted to its present system of government. The digest did not purport to make any amendment of the law in relation to substitutions and *fidei commissa*, and none flowed from the new system of government in Louisiana. The terms of the article indicate, that the juriconsults were adopting, not altering, the existing laws.

The words of the code are, "substitutions and *fidei commissa* are, and remain prohibited;" equivalent to saying, we declare what is, and shall remain, the law on these subjects, not that they are hereby prohibited. Now, what substitutions and *fidei commissa* were prohibited, by the laws, anterior to 1808? It has often been decided, that the laws of Spain were in force in Louisiana at that period. The laws of Spain on the subject of substitutions and *fidei commissa*, are summed up in Filreno, part. 1. c. 1, § 3, as follows:

"*Fidei commissary* substitutions have come to us from the Roman law. At Rome they were not held obligatory till a period much posterior to the establishment of the republic. All depended on a principle of good faith and probity. The order of successions and testaments being fixed by the laws, testators sought a means of leaving their property to proscribed persons, to exiles, to unmarried men, and other persons who could not inherit. Instituting legal heirs in their wills, they charged such heirs to restore, or deliver up their property to these persons. But it happened frequently that the fiduciary heirs appropriated the estate, or kept it back longer than the testator had ordered, or that others were unwilling to accept or enter upon the inheritance, in order to free themselves from the responsibility which brought with it no utility; and thence it resulted that *fidei commissa*, and all the remaining dispositions in the will, failed, to the prejudice of the true heirs and the legatees. Under these circumstances, Augustus ordered that the consuls should take *fidei commissa* into consideration. A prætor was created to try the lawsuits which arose on this subject. Various *senatus-consulta* were made to restrain and remedy the abuses which had crept in, and as they did not produce the desired effect, it was thought expedient to give an interest to the fiduciaries. For this, was made the trebellian *senatus-consult*, thus called from its author Trebellius, the Consul, by which the fiduciary could retain the fourth part of the inheritance, but dividing the actions and the charges with the *fidei commissary* in proportion to the share of each."

I am satisfied the juriconsult, who penned the article 1507 of our code, had this section of Filreno before him, from the remark in the article itself, that in consequence of this article, the trebellianic portion of the civil law, is no longer a part of our law; which remark was not in the article of the Napoleon Code, which he copied.

Now, the *fidei commissary* substitutions and *fidei commissa* thus enumerated and explained by Filreno, were thus disposed of by ordinance of Charles the III, in May, 1789.

"Considering the evils which flow from the facility which has existed of entailing estates forever, by an abuse of the permission granted by the laws to that effect, whereby idleness and pride, are promoted in the possessors of small entailed estates, and in their children and relations, which deprives the army, navy, commerce, the arts and trades of their services, I have resolved, that, henceforth, no one can found an entail, nor prohibit forever the alienation of his estates for that purpose, without obtaining my previous permission, \* \* \* and



the contrary is only permitted in the case of great public utility." *Novis. Recop. SUCCESSION OF FRANKLIN.* Lib. 10, tit. 17, Law 12.

It was, therefore, substitutions which changed the order of descents and fostered pride and laziness, and abstracted property from commerce, and *fidei commissa*, by which one held property for another who was incapable of receiving, or for an unlawful purpose, which were prohibited by the laws of Spain, in force in 1808, and which the juriconsults who framed the code, declared are and remain prohibited.

It has been supposed, however, that the juriconsult who penned the article, referred to the laws of France, not only because he was born and reared under her jurisprudence, but because he adopted *verbatim*, the language of the Napoleon Code as to substitutions, and extended it to *fidei commissa*. If so, the result, in the present case, would be precisely the same. A substitution by the French and Spanish jurisprudence, is the same, and inapplicable by its exact definition to the will of *Franklin*. In France, *fidei commissa* were, and remain to this day, lawful for lawful purposes, and were reprobated only when used for an unlawful purpose. Now, the chapter of our code, in which the article under consideration is found, treated "of dispositions reprobated by law in donations *inter vivos* and *mortis causa*," not of donations which were not reprobated by law. The digest did not purport to establish new, but to publish existing reprobations in donations, and using in the article the terms of the Napoleon Code as to substitutions, all of which were prohibited, extended the prohibition, as expressed in the title of the chapter, to reprobated *fidei commissa*. The donation to one, to hold for another capable of receiving, for a useful and lawful object, and from good motives, was never reprobated by the French Code, or any other system of laws. Therefore, I am obliged to express the opinion, that our late Supreme Court fell into an error in the case of *Tournoir v. Tournoir*, 12 L. R. 23. And to conclude, that even if there was a *fidei commissum* in the bequest of *Franklin* to the seminary in Tennessee, as the object was lawful, and the trust created from good motives, it does not fall within the reprobated donation of which alone the chapter of the code so often cited, treats, and, therefore, is not a donation that falls.

From a full consideration, then, of the clause in the code abolishing *fidei commissa*, the time and circumstances under which it was adopted, and the title of the chapter in which it is inserted, I am of opinion, that the clause means, in the English language, nothing more than, that trusts for unlawful purposes are abolished, and thus truly interpreted, it is not only a harmless but wise provision of law.

But I have seen so much litigation growing out of this enactment substantially in the Latin language, so much perversion of right and restraint of the innocent wishes of men as to the disposition of their property, that I shall hereafter entirely disregard it, as having been inserted in our code of 1825, in violation of a clause in the old and present Constitution, requiring the laws to be published in the English language. In my opinion, the constant resort to foreign jurisprudence, in languages dead or alive, for the government of our State, produces a baneful effect, and was intended to be restrained by the Act of 1828, which abrogates all civil laws which were in force before the promulgation of the Code of 1825. They are to be looked to merely as a means of elucidation, where there is no written law. But in such cases, there is an express rule prescribed by the 21st article of the code. The judge is bound to

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The view I have taken of the articles 1506 and 1507, prohibiting dispositions reprobated by law, and substitutions and *fidei commissa*, shows that they can have no effect upon *Franklin's* bequest. They prohibit the perpetuation of property, by will, in persons, beyond one life, to preserve the order of legal inheritance; they prohibit trusts for unlawful purposes, and no other trusts. The laws of France, Spain, and of our own code, quoted on these subjects, refer exclusively to natural persons, and have no relation whatsoever, to bequests for the establishment of institutions of public utility. These could be founded and permanently established in France and Spain, from whence we derive the articles of our code. There was no prohibition to the contrary in those countries. And so far from there being a prohibition in our code against similar donations, they are recognized in the most general manner, by article 1536 of the code. "Donations made for the benefit of an hospital, of the poor of a community, or of establishments of public utility, shall be accepted by the administrators of such communities or establishments." If there be no administrators, as is the case with an establishment founded by the testator, it is for him to appoint them or direct the mode of appointment, because no law forbids it. Or, he may defer to the Legislature the mode of their appointment, by an act of incorporation. As establishments of public utility are in general intended to be perpetual from their nature, so donations, made in order to found them, are generally made perpetual in their charter. The property bequeathed may be, and generally is, converted into a perpetual fund to support the establishments by its revenues.

There is no law which forbids the perpetuity of establishments of public utility, and no policy adverse to them, nor any law which forbids the perpetual endowments of such establishments. So far, there has not been, in this State, the perpetual destination of property to such establishments, by will, to such an extent as to create the least detriment to commerce or restraint upon alienations, injurious to the public.

I doubt if that will ever be the case in this State, where property thus destined by some, is soon, by waste, extravagance and unfaithfulness, again thrown back into commerce and speculation. When evils shall arise from the accumulation of inalienable property, by its destination to establishments of public utility, the sovereign Legislature to whom it rightfully belongs, will afford the remedy. Courts are not to usurp, without law, the business of remedying or preventing the evils which are yet at least only imaginary.

Trustees or other administrators of these institutions, must accept, hold in trust, and administer these donations for the institutions. These institutions are corporations, and can only act by trustees, directors, administrators or others. By them they are expressly authorized to act by the 429th article of our code. They are likened to minors, by the French commentators. Others, from necessity, must act for them. And after all, this system of trusts, frightful only in imagination, amounts to this, that the property is in reality given to persons incapable, not of receiving, but of administering the property; and trustees are appointed who have the power of administering it for the incapable owner, and nothing more. And the system must, from the nature of the case, exist as to

all institutions of public utility and in all countries. Our system of laws is full of trusts. Executors are trustees; syndics are trustees; curators and tutors are trustees. The directors of asylums and all charitable institutions, are trustees of all the donations daily made to them. The list of such trusts, might be multiplied almost indefinitely. And I know of no restraint upon them, except when they are reprobated by law.

I come now to apply these principles to the controverted bequest in *Franklin's* will. He gave one-third of his estate to establish an academy or seminary of learning in Sumner county, in the State of Tennessee, for the purpose of giving his descendants, and the descendants of his collateral relations, and the poor children of the county, a substantial and good English education, and such other and higher and ornamental branches, as the revenues of the bequest would enable his trustees to accomplish.

The establishment of a seminary for education, in a sister State endeared to us by so many recollections of common sacrifices and brilliant achievements; connected with us by a commerce so highly beneficial to both, and by a constant intercourse which renders us so homogeneous in character, must be regarded by all our citizens as an establishment of public utility.

It was said in argument, that the bequest was an attempt of the testator to gratify his pride, by establishing a kind of aristocracy in his family. The few relics of his character left in the record, will scarcely justify the remark on behalf of his widow and child. If he had devoted the seminary to attract around it only the descendants of his blood relations, for the purpose of enjoying its advantages, the only aristocracy it conferred was, to receive the best of all legacies, in the language of the will, a substantial and good English education. But, it will be seen by the will, that his munificence extended to all the poor children of his native county, of unexceptionable character. Having acquired great wealth, by his own exertions, by industry, economy and good fortune, when, by will, he undertook to make the best disposition of it, in prospect of death, after providing most magnificently for his own immediate household, he turned his thoughts to those connected with him by blood, and to his native county, remembered its poor, and provided an establishment in which they could receive the greatest blessing of life, a good and substantial English education. This must be, in the language of our code, an establishment of public utility, and forbidden by no law, human or divine.

He gave the property to the institution. No other interpretation can reasonably be given to the terms of the bequest. And we are bound by law to interpret it so as to give it effect, and not to annul it. The trustees and magistrates of the county were appointed, merely to administer and manage it for an institution, which could not do so. The children were the donees, until the institution was incorporated. The children could neither receive nor administer the property. And yet, they could take the bequests, indefinite as they were. It was so decided by our late Supreme Court, in the *Succession of J. C. Mavy*, 2 R. R. 440, as to a bequest to the poor of New Orleans. And whoever wishes to see all the decisions settling the jurisprudence on this subject, are referred to the great argument of Mr. Binney, for the city of Philadelphia, in the contest as to Mr. Girard's will.

Suppose, however, we consider the question in the point of view the appellee's counsel contend it ought to be considered, what will be the legal result? As to the great and leading object of *Isaac Franklin*, there can be no doubt: it was

**SUCCESSION OF FRANKLIN.** to found an institution for the education, not only of the children of his own relations, but of all the children, so far as the means provided would admit, of his native county. That this object was legal, and highly laudable, cannot be disputed. The inquiry, then, arises, whether there is anything illegal or contrary to public policy, in the means by which *Franklin* sought to accomplish that object?

Now, if he did convey the title to the property destined for the endowment and support of the seminary, to his brothers, *William* and *James Franklin*, they were only the instruments through whose agency the seminary was to be established and administered, until the Legislature of Tennessee should pass the necessary acts incorporating the seminary, and providing for its administration. This, then, is a trust, uncoupled with an interest, vested in two persons, for the purpose of accomplishing a lawful object, as soon after the testator's death as, in the nature of things, it could be done. Is such a trust void, as prohibited by law, or repugnant to public policy? The question presents precisely the case of *Mathurin v. Livaudais*, in which the decision of our Supreme Court, in favor of the trust, has always been approved. It is a trust, uncoupled with an interest, valid by the settled jurisprudence of our State since that decision; and, therefore, if even a *fidei commissum*, tolerated and permitted by our laws, like many others, where the end to be obtained by them was legal and laudable.

The dispositions of the will being lawful, it is the imperative duty of the courts to carry them into effect, even if the mode of doing so, directed by the testator, should fail or be unlawful, as in the case of *Clague's Widow v. His Executors*, 13 L. R. 7.

What law of Louisiana prevents us from adopting the reasonable rule of Lord Talbot, in *Hopkins v. Hopkins*, that, in such cases, the method of the courts is, not to set aside the intent, because it cannot take effect so fully as the testator desired, but to let it work as far as it can; or, of the Master of the Rolls, in *Frelluson v. Woodward*, that if the court can see a general intention, consistent with the rules of law, but the testator has attempted to carry it into effect in a way that is not permitted, the court is to give effect to the general intention, though the particular mode shall fail. 4 Vesey, Jr. 329. 1 Pierre Williams, 332. 2 Brown's Chan. 51.

The modes of carrying the will into effect, are mere incidents to the will, and do not affect its substantial and valid dispositions. If the modes prescribed for carrying them into effect are impossible or contrary to law, they are reputed not written, (Art. 1056,) and the courts will cause them to be executed by other means. The executors are bound to see the will faithfully executed, as long as they live, unless discharged; and in that case, if necessary, the courts will appoint dative executors. Though I by no means consider it necessary or proper, in the present case, to annul the invaluable dispositions in this will, because the forms prescribed for carrying them into effect may be considered objectionable; it would be the sacrifice of an object of great public utility to immaterial forms, which can never be done, except, by what too often occurs, the sacrifice of public rights to individual interest.

The perpetuity of the donation, however, is made a serious objection to its validity. It is said, the revenues alone of the property bequeathed to the institution, are destined to its support for five hundred years; that this takes the property itself out of commerce, and renders it inalienable, to the great injury of the State of Louisiana.

There is no express prohibition of the alienation of the property, but as the will directs the institution to be supported out of the revenues, and as the object, the support of a seminary of learning, is from its nature intended to be perpetual, it was no doubt the wish of the donor that the property should remain inalienable. I find no law of our State opposed to the inalienability of property, destined by its revenues to support an institution of public utility, intended from its nature to be perpetual. And all good policy indicates, that such property should be inalienable to prevent the waste, extravagance and exposure to total loss, by being converted into money. There is, and always will be, plantations and property enough for sale in Louisiana, without forcing into the market the very few that will ever be destined, by their revenues, to the support of establishments of public utility. The equal distribution of estates among children and other heirs, by our laws, and many other causes which it is unnecessary to detail, will forever prevent the burdensome accumulation of estates or their inalienability to an extent at all injurious to the State; and when that occurs, the sovereign State may direct the alienation of the property, and prohibit its inalienability in future. At present, perhaps, a greater evil consists in the constant changes of estates, so as to counteract, in some degree, their permanent improvement and increased productiveness.

It is asked, can the sovereign State of Tennessee directly, or by a corporation of her own creation, be permitted to hold and administer estates in Louisiana, the revenues of which alone are to be expended? Certainly! because there is no law of this State prohibiting a sovereign State from receiving a legacy from a citizen of Louisiana, nor a corporation created by that State; nor, in my opinion, any policy of our State opposed to it.

The idea has been much urged, that our code prescribes certain rights of property, and can recognize no others at the will of individuals. There is ownership perfect and imperfect, the right of usufruct, use and servitude. In my opinion, but a single right of property is established by *Franklin's* will, and that is ownership in favor of his seminary. His intention is clear to give the property to the seminary, but its revenues alone are to be used. This restriction is but a mode of administration, which he had a right to impose on the institution he founded, and is not a modification of the title to the property. He had the right to impose it, because the institution is to be likened to a minor, incapable of selling his property, or of even administering it, but entitled to its revenues for his support. He is the owner of his property, but, from minority, disabled from administering, much less from selling it. The Franklin Institute was created with the same disabilities, which the founder imposed on account of its assimilation to a minor.

There can be no objection to this mode of administration, because it is almost universally adopted as to the endowment of institutions, and because no law or policy of the State forbids it. Usage, in default of express law, fully justifies it, as prescribed by article 21 of the Civil Code.

If the revenues were to be received by another person than the owner, it would constitute a kind of usufruct. But as the revenues are to be enjoyed by the owner, the ownership is perfect, and there is neither usufruct nor servitude. If a restraint upon alienation had been established, that would have affected the administration, not the ownership of the property. Such restraint is highly useful in the foundation of charities, or the endowment of institutions for education, to prevent waste, extravagance and even total loss; but they relate to the administration and destination, not the ownership of the property, and may be always changed by the sovereign power of the State.

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The destination of the interest of the city, for example, in its waterworks, does not affect its ownership of that interest. The destination of its ground-rents to particular objects, of the revenues of its markets to a sinking fund to extinguish loans, based upon their faith, renders the property inalienable, but does not destroy the ownership of the city, because it affects the administration, not the title of the property. To apply these observations to the present case, the property is to be administered for the institution, in such a manner that the capital shall be preserved, and the revenues only expended for the support of the Franklin Institute. The trustees of the property are, therefore, merely administrators for the owners of the property, and limited to the expenditure of its revenues.

These principles might be illustrated by reference to the Roman distinction and definitions of property, the *jus fruendi*, the *jus utendi* and the *jus abutendi*, but they are more easily understood by all in the English language, and, therefore, the reference on my part, at least, would be but useless pedantry.

If, however, such ownership or administration, as is created by this will, becomes burdensome to our State, or adverse to our interest, it is always competent to our sovereign State to direct it to cease, as there is no express prohibition in the will to alienate the property; and our Legislature might direct the alienation of the property, at any time, without violating even the terms of the will.

I feel it an imperative duty of the office I hold, to guard, with all possible strictness, the conjections of all wills, except in the olographic form, on account of the horrid impositions which have been practiced upon men in *articulo mortis*, under the pretext of wills.

But when it is ascertained, beyond a doubt, that a man has made a will, it is a more imperative duty, in my opinion, to carry it into full and entire effect, unless forbidden by express law. And, in doing so, I will not regard much the whole policy of the law, terms of very different meanings, in the minds of different men. As in the case of the great bequest of *Stephen Girard*, it was contended, with apparent sincerity, by the ablest counsellors in the Union, elevated above the mere influence of fees, that the liberal principle of the testator, excluding religious proselytism from his college, was not only against the whole policy of human laws, but a direct violation of Divine legislation.

Upon the whole case, I think every clause of the testament of *Isaac Franklin* can legally, and ought to be carried into full and entire effect. And, especially, that the great monument of wisdom and benevolence which he attempted to erect, should be left to perpetuate his memory, since, in my opinion, neither our laws nor any motives of public policy exist for crumbling it to the dust.

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### JOHN B. CHANDLER v. MARY HOUGH et al.

Where the plaintiff alleged, in his petition, that he was of age, and the judge could not have acted on it, unless he was satisfied of the fact, the action of the judge creates a presumption of plaintiff's majority, which can only be overthrown by clear proof of minority.

Where witnesses speak positively and minutely of facts in which they were not interested, and which happened many years before, when the witnesses were children, their testimony will not be sufficient to form a ground of belief.

CHANDLER  
v.  
HOUGH.

**A**PPREAL from the First District Court of New Orleans, *Larue, J. R. H. Merr*, for plaintiff. *R. M. Carter, W. S. Upton, A. A. Frayser, P. S. Warfield, Armand Pilot, G. B. Duncan, H. D. Ogden, C. M. Emmerson, B. C. Elliot*, and *John Winthrop*, for defendants. By the court: (*Slidell, J.*, absent.)

*Ross, J.* The plaintiff, as sole heir of the testatrix, *Rachel Bannister*, seeks to avoid the orders of the court for the sale of the property of the succession of his mother, and the judgment of homologation rendered on the final account of the executor, on two grounds:

First: That he was a minor when the judgment and orders of sale were given, and that he was not represented in them.

Second: That said orders and judgment were obtained by fraud and malpractices, in consequence of which the entire assets of the succession were wasted and dilapidated.

The defendants have denied the fraud and malpractices charged, and averred, that the plaintiff was of age and a party to all the proceedings; and that the orders and judgment of the court, in the premises, are binding upon him.

The district judge rejected the plea of minority, but reversed the judgment of homologation as far as related to three of the defendants, and gave judgment against them for the amount allowed them in the account, reserving their rights to prove such claims as they may have against the succession. The plaintiff alone has appealed.

The testament of *Rachel Bannister*, bears date the 8th of March, 1847. She states in it, that the plaintiff was nearly twenty-one years of age. On the 8th of June, 1847, the plaintiff himself filed a petition, praying to be recognized as heir of the testatrix, in which he averred, that he was then of age. The court being satisfied of that fact, and of his right as heir, ordered him to be recognized as such. In July, 1847, before the date of the orders and judgment complained of, he presented another petition, in which he still represented himself of age, and prayed to be put into possession of the succession.

The district judge considered these acts and declarations of the mother and son, as making a *prima facie* case against the plaintiff; and, being of opinion, that the evidence adduced to prove his minority was insufficient to destroy the effect of those acts and declarations, he rejected the plea of minority and maintained the orders of sale of the property.

Much weight is due to declarations made in testaments. The presumption of truth which the law attaches to them, is carried so far, that impossible conditions appended to the dispositions they contain, which, if found in a contract, would avoid it, on the ground, that the parties who stipulated them could not have been serious and truthful, when found in testaments, are considered as inserted inadvertently, and are reputed not written.

The declaration of the mother was followed by the petition of the plaintiff, in which he stated, that he was of age. The judge could not have acted upon that petition, unless he was satisfied of that fact. And as he was, the presumption of *omnia rite acta*, which attaches to judicial proceedings, should prevail against the plaintiff until his minority is clearly proved. It was urged in argument, that the attorney of the executor represented him in this proceeding, and that he falsely stated he was of age, in order to legalize, by his presence in court, the frauds in which they were both engaged to his prejudice. This objection loses its weight when it is considered, that before any of the

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proceedings complained of took place, he employed other counsel to cause himself to be put into possession of the succession, to whom he also represented that he was of age. He now states, that his mother and himself, were in error in relation to the year of his birth; but he nowhere alleges in his pleadings, nor has he shown, when and in what manner he discovered the error; in the meantime, third parties have acted upon the state of facts, that he and his mother have created, and the decree of court resting upon the truth of those facts, and have paid out their money for the property of the succession, which they have purchased in good faith. We fully concur with the district judge, that the error alleged, should have been conclusively proved, and that unless it was, the plaintiff's case was not made out. The testimony offered by him on this branch of the case, was taken under commission. We have perused it with great care, and are unable to say, that it has carried conviction to our minds, or that the district judge did not give it the credit to which it was entitled. The facts in relation to which the witnesses testify, occurred in 1826 or 1827, at which time the only two who swear positively, were twelve and thirteen years of age, and one of them was a girl. Their recollection of facts and dates, in a matter in which they have no interest, is positive and minute, far too much so, to form a sufficient ground of belief. The testimony of the other witnesses is mainly conjectural, and there is nothing in it which would authorize us to interfere with the judgment.

We conclude then, that the plaintiff was of age, when he was recognized as heir of his mother, and that the orders of sale of the property of the succession, are binding upon him. *Bond fide* purchasers have nothing to do with the question, whether the executor sold more property than was required to pay the debts of the succession. If he did, and the plaintiff was injured thereby, his only remedy is against the executor in a proper action. He has not, in this record, proved the injury so as to entitle him to damages on that ground.

The plaintiff's counsel has expressly disclaimed any intention of charging fraud and ill practices against any of the defendants, except those against whom he has obtained a judgment annulling the decree of homologation, so far as they are concerned; and as fraud and ill practices are the only remaining grounds of the plaintiff, upon which the judgment of homologation can be annulled, it is clear, that we cannot interfere with it, so far as it settles the right of parties against whom no fraud or ill practices are alleged. As to the parties against whom judgment has been rendered, the judgment is manifestly right, and they have asked no change in it.

It is therefore ordered, that the judgment in this case be affirmed; and that the appellant pay the costs of the appeal.

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CHARLES GILLOUTET v. PAUL MARCELIN.

Where the clerk's certificate shows that the record does not contain all the evidence in the suit, the appeal will be dismissed.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. C. Dufour*, for plaintiff. *M. M. Cohen*, for defendant. By the court: (*Slidell, J.*, absent.)



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v.  
MARCELLIN.

ROSE, J. In this case the clerk has certified that, with the exception of the writ of injunction, issued on the 9th of August, 1850, which has not been returned, and the record of the suit of *Octave Anfour v. Charles Gilloutet and Wm. B. Converse*, No. 4695 of the docket of the Second District Court of New Orleans, offered in evidence by the defendant, a transcript of which has not been furnished, the record contains a correct transcript of the proceedings, as well as all the documents filed, and all the testimony adduced on the trial.

This certificate is clearly insufficient; and, as a diminution of the record was not suggested at the proper time, and it contains no bill of exceptions or statement of facts, and no assignment of errors has been filed, the appeal must be dismissed.

It is ordered, that the appeal be dismissed, with costs.

### J. N. DEPUILLY v. THE WARDENS OF THE CHURCH OF ST. LOUIS, New Orleans.

Defendants employed plaintiff as an architect, in the reconstruction of the cathedral; he was dismissed without cause. *Held*: That defendants are bound for the full amount of compensation agreed on.

An employer has the right of dismissing a person whom he employs, at pleasure, and no damages can be recovered for the exercise of that right.

**A** PPEAL from the Third District Court of New Orleans, *Kennedy, J. A. Grailhe and C. Redmond*, for plaintiff. *Benjamin and Micou*, for defendants. By the court: (*Slidell, J.*, absent.)

PRESTON, J. The plaintiff claims from the defendants a large sum for services rendered, and plans furnished to the defendants, as their architect, in superintending the extensive alterations and repairs which they have lately made to the Church of St. Louis. Also, for damages for having been dismissed from their employment, in violation of a contract with them, without any cause.

The defendants allege, that they had paid him for all plans and specifications in relation to their contemplated improvements in the cathedral.

They admit that they employed him to inspect and superintend the works to be done on the cathedral, according to his plans and specifications, but at a compensation of three per cent upon the amount of the contract, for the execution of the works. And they aver, that he so negligently and carelessly performed the duties intrusted to him, that they were compelled to dispense with his services, and discharged him from their employ long before the work was finished, to which he made no objection.

We find, in the record, receipts from the plaintiff to the defendants, for five hundred dollars, for plans made in relation to the works in March and April, 1848; and, from his letter, asking payment, it is clear this sum was in full of plans made up to that period.

It was not until the 5th of December, 1848, that the defendants determined, by resolution, to make improvements and repairs to the church, and advertised for plans and estimates of the repairs. On the 13th of February following, they determined, by resolution, to employ the plaintiff as their inspector and superintendent of the works, agreeing to allow him for his compensation three

**DePUILLY** per cent on the amount of the contract for the works, without any claim for the WARDENS plans.  
**THE WARDENS**  
**OF THE CHURCH**  
**OF ST. LOUIS.**

Objection was made by the defendants to evidence, that he assented to this resolution; but we find no other under which he was employed at all. We must presume that he acted under it, and with a knowledge of its contents. In fact, one large claim in his account is claimed under it, and it would be difficult to maintain the judgment of the district court, in his favor, without this resolution, and his acceptance of it.

The defendants, on the 12th of March, 1849, made a contract with *J. P. Kirwan* to make all the alterations, repairs and improvements of their cathedral, according to the plans and specifications furnished by the plaintiff, under his superintendence, as their architect, for the sum of twenty-seven thousand dollars. They determined afterwards to make other alterations and improvements, for which they made, on the 22d of June, 1849, a contract with the same contractor, to be executed under the superintendence of the plaintiff as their architect, for nineteen thousand dollars.

In the progress of the work, a vast tower, which the defendants were erecting, gave way, fell and crushed parts of the building and walls, with great loss and delay to them. It is unnecessary to examine the causes of the misfortune further than to pronounce, that it clearly appears from the evidence that it did not result from the fault, want of skill, or negligence of the architect. The misfortune, however, engendered that dissatisfaction which induced the defendants to dismiss the plaintiff on the 2d of July, 1850, and employ another superintendent, who continued the works by his plans and specifications. Nothing was charged as to *DePully*, except that another mechanic than *Kirwan* was to execute his plans. The evidence establishes, that he was dismissed without any just cause, and is therefore legally entitled to the full amount of compensation proposed by the resolution under which he was employed. He, at least, falls within the equitable provision of article 2736 of the Code, and his damages amount to the compensation he was to receive.

The plaintiff contends, that he is entitled to receive the same per centage on the expense of rebuilding the tower. There is no evidence that the defendants employed him to superintend that work.

He claims further, a large amount of damages for injury to his character as an architect, caused by his being dismissed from the employment of the defendants, without cause. The defendants had the right to dismiss him at pleasure, and therefore no damages can be recovered for its exercise beside the loss of his wages. Besides, no damages are specifically proved.

We think the judgment of the district court meets the justice of the case. It is affirmed, with costs.

**Rost, J.** If this case was before us without the resolution adopted by the defendants, after the fall of the tower, to continue the plaintiff in his employment, as superintendent of the unfinished works of the cathedral, when they should again be prosecuted; the evidence in the record would probably lead me to the conclusion, that the commissions he claims should only be allowed upon the amount actually expended, on the work, at that time. But I do not feel at liberty to look behind the approval of his conduct, which that resolution implies; it was passed without reference to the contract between the defendants and *Kirwan*, and as nothing is shown, after its date, to justify the plaintiff's dismissal, the defendants must submit to the rule *ex ore tuo te judico*. For these reasons, I concur in the opinion of Mr. Justice Preston.

## WILLIAM E. LEVERICH v. MRS. CLEMENCE TOBY.

In a petitory action, where a mortgage creditor is not a party to the record, no judgment can be rendered in his favor which would be binding on the defendant in the suit.

Property mortgaged, while held by a simulated sale, must be subject to the mortgages as to the true owners. *Preston, J.*

The sheriff, on a mortgage debt against A, seized under execution the mortgage property which was in the possession of B, to which B claimed title, and for which a suit was then pending between A and B. *Held*: That the purchaser at the sheriff's sale acquired, not the property, but the rights of A to it. The plaintiff should have proceeded against it by hypothecary action, and could only have had it sold after the demand and other proceedings necessary to render property, in the possession of, and claimed by a third person, liable for a mortgage given by another. *Preston, J.*

**A**PPEAL from the District Court of the Parish of Jefferson, *Clarke, J. Benjamin and Micou*, for plaintiff. *Ogden and Duncan*, for defendant. By the court: (*Slidell, J.*, absent.)

**PRESTON, J.** On the 2d of November, 1838, *Henry Lockett* purports to have purchased from *William McCawley* a portion of ground in the city of *Lafayette*.

On the 2d of March, 1842, he mortgaged it to the Merchants' Insurance Company of New Orleans, for five thousand dollars.

They sued and obtained judgment against *Lockett*, for a portion of the loan. He paid the judgment with subrogation, and, on the 30th of January, 1850, issued a *pluries fieri facias* against the property, caused it to be sold, and *Leverich* became the purchaser. He found *Mrs. Toby* in possession of the property, and, on the 9th of May, 1850, brought this suit to recover it. The suit was dismissed on the peremptory exception, founded on law, of *litis pendentis*.

The exception was founded on the following facts. Notwithstanding the purchase in *Lockett's* name, *Thomas Toby* and family had always been in possession of the property, and greatly improved it by buildings, and gardens, and shrubbery. After *Toby's* death, *Lockett* attempted, by a suit before a justice of the peace, to dispossess *Mrs. Toby*, his widow. She enjoined the proceedings for that purpose, adjudging the property to be hers.

It was then agreed between them, that an answer should be filed by *Lockett*, amounting to a petitory action for the property, it being admitted that *Mrs. Toby* was in possession. This agreement was made the 12th of January, 1850, and the answer, by *Lockett*, claiming title to the property, was filed the same day.

The purchase of, and suit by, *Leverich*, for the property, was under an execution subsequently issued.

As *Leverich* never was made a party to the suit between *Mrs. Toby* and *Lockett*, we thought he might have rights which did not belong to *Lockett*, and therefore, that the suit between the latter and *Mrs. Toby* could not be considered as a suit pending between her and *Leverich*.

We reversed the judgment sustaining the exception, and remanded the cause for further proceedings, on the whole merits. In doing so, we expressed the

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Toby.

most decided opinion, that the property was bound by the mortgage given by *Lockett* to the insurance company in 1842, unless a combination between *Lockett* and the company, or *Leverich* and *Lockett*, to defraud *Mrs. Toby*, could be shown. She has failed entirely to show any such combination. The knowledge of a deceased brother of *Mr. Leverich*, who was a director of the company, that the property was not *Lockett's*, is not the knowledge of the company. Besides, as suggested in our former opinion, we are not satisfied that *Lockett* had not authority to mortgage. Upon the whole, we find nothing in the evidence in this case sufficient to take it out of the uniform course of decisions by this court, that property, mortgaged while held by a simulated sale, must be subject to the mortgage as to the true owners.

When the case was last before us, however, we expressed our dissatisfaction with the proceedings of the sheriff, in selling, under an execution against *Lockett*, property in possession of *Mrs. Toby*, to which she claimed title, and for which a suit by *Lockett*, against her, was pending. He could not legally seize, take and deliver possession of the property to *Leverich*, as this suit shows, even if parol proof on the subject might be excluded; and, *Leverich* said, in purchasing, that he was buying a lawsuit. Under the circumstances, we are of opinion that *Leverich* acquired only the rights of *Lockett* to the property. The suit between him and *Mrs. Toby* was continued and decided in her favor. The judgment on appeal to this court, was affirmed and the property decreed to belong to *Mrs. Toby*. *Leverich* might have intervened, and prosecuted the suit more successfully; but he did not. He therefore acquired nothing by the sale. The suit establishes, that the property belonged to her, and was in her possession at the time the execution was issued against *Lockett*, by virtue of which it was sold. It was, then, property subject to the mortgage given by *Lockett*, but in possession of a third person, who, *bond fide*, claimed it as owner.

The plaintiff should therefore have proceeded against it by the hypothecary action, and could only have had it sold after the demand and other proceedings necessary to render property in the possession of and claimed by a third person, liable for a mortgage given by another.

There is a circumstance, alluded to in our former opinion, which has given us some difficulty. *Mrs. Toby* made herself a party to the execution by the insurance company against the property, and opposed it, on the ground that she was owner. The opposition was fixed for trial, and she failing to appear, a nonsuit was entered upon it. She took a rule, however, to set aside the nonsuit, and have her opposition tried upon the merits; which, so far as the record shows, is still pending. On the whole, therefore, we think this matter should not prejudice her rights.

The judgment of the district court in this case is against *Leverich*, and in favor of *Mrs. Toby*. Upon strict principles of law, it might be affirmed, as he acquired no title to the property as to her. But we will settle this protracted and unfortunate litigation, like all which grow out of similar circumstances, as far as the record enables us.

It appears by the records before us, that two of the steps in a hypothecary action have been taken, as to the property in the possession of a third person, subject to a mortgage given by another person. Judgment has been rendered against the mortgagor; demand, even by execution, made of payment, more than thirty days: and the mortgage has not been satisfied. The next step is, to make demand of the possessor of the property, for ten days, and then to sell the

property to satisfy the mortgage, if not satisfied in the meantime by the third possessor of the mortgaged property.

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I think we should decree, that the property is subject to the mortgage of *Henry Lockett*, in favor of the Merchants' Insurance Company of New Orleans, to the amount of three thousand five hundred dollars, with eight per cent interest from the 17th of March, 1847, until paid, three dollars, costs of protest, and costs of their suit; that demand has been made of *Henry Lockett*, the mortgagor, for more than thirty days, as appears by the returns of executions against him; that *Mrs. Toby* is bound to pay the debt or surrender the property, to be sold. I think, therefore, it should be decreed, that if *Mrs. Toby* does not pay the amount of her debt, with interest and costs, within ten days after notification of this decree, that the property mortgaged, to wit, eight lots of ground, with the buildings and improvements thereon, situated in the Fourth District of New Orleans, in the square designated No. 91, on a plan drawn by Benjamin Buisson, Surveyor, dated the 5th of March, 1832, deposited in the office, then, of Felix Grima, notary public, measuring each 53 feet 6 inches on First street, by 182 feet 6 inches in depth, being in the square designated as 164 on the city plan, bounded by Prytania street, First and Plaquemines streets, and the boundary line of Livaudais, be sold by the sheriff, according to law, and the amount of the debt, interest and costs, be paid out of the proceeds.

ROST, J. I agree with Mr. Justice Preston in relation to the facts of this case; but I do not see how we can do anything more than affirm the judgment. This is purely a petitory action. The defendant sets up title, and avers the nullity of the title of the plaintiff. The district judge determined, that she had made out her case, and we all concur in that opinion. The judgment, therefore, must be affirmed.

The creditor, who holds the mortgage, is not a party to the record, and no judgment rendered in his favor would be binding upon the defendant. He has the right to proceed by the hypothecary action, for the amount stated in Mr. Justice Preston's opinion; but we cannot give him a judgment before he demands it.

Judgment affirmed, with costs.

EUSTIS, C. J. I concur with Rost, J.

### ALEXANDER GRANT v. JOHN McDONOGH.

A proprietor who neglects to keep up the levees in front of his land, is bound to make indemnity for any damages resulting from the negligence.

Even where the jury are justified in allowing exemplary damages, the damages allowed should bear some proportion to those sustained.

**A**PPEAL from the Second District Court of New Orleans. The case was tried by a jury before *Lea, J. J. Q. Bradford*, for plaintiff. *C. Roselius*, for defendant. By the court:

ROST, J. Plaintiff claims \$31,000 damages, for the inundation of his plantation, during two successive years, alleged to have been caused by the neglect of the defendant to make and keep in repair the levees in front of his lands, adjoining that of the plaintiff, above and below.

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v.  
McDONOUGH

The case was tried before a jury, who found for the plaintiff \$21,960 40. The executors of the defendant, who died after the institution of this suit, have appealed from the judgment rendered on the verdict.

It may be assumed, that the plaintiff's petition sets forth a sufficient cause of action; that the defendant was bound to indemnify him for any damages arising from his, the defendant's, negligence, in keeping up his levees in front of his lands. And, that under the facts of the case, the gross negligence of the defendant, after the repeated orders given to him, to repair his levees, was such a *quasi* offence, as left much discretion to the jury in the assessment of damages. Yet, there is a limit to that discretion, and we are of opinion that it has been far exceeded by the verdict.

*Charrier*, the plaintiff's own witness, who seems to have had better opportunities of knowing the localities than other witnesses examined, has testified, that about the same time that the water entering through the openings in one of *McDonogh's* levees, commenced flowing over the plaintiff's land, there was a caving in of part of his other levee, and another, fourteen arpents wide, on the adjoining levee on the land of *Rebisc* and *Guesnard*; and that the water continued to flow over the plaintiff's plantation during the entire season of high water of 1849.

Much is to be presumed against the defendant, by reason of his bad faith; but crevasses fourteen arpents wide, on the banks of the Mississippi river, have never been stopped; and the possibility of closing two breaches in the levee, in this case, should have been shown, to authorize the presumption that they would have been closed, if there had been a substantial levee on the land of the defendant.

The probable estimate of the crops which the plaintiff would have made, if he had planted them, and if he had further put up the buildings and machinery necessary to manufacture the cane into sugar, are greatly exaggerated, and would be, under any circumstances, most unsatisfactory evidence of the real damages sustained. *Seaton v. Municipality No. Two*, 3 Ann. 44.

No crop had ever been made on the place, and it is not shown that the plaintiff would have made one, in 1849, if the levee of the defendant had been in good order. As the loss of the seed cane, of the corn, and of the cord-wood, and the filling up of the drains, were the result of the overflow of that year, and there is no evidence that seed might have been procured to plant a crop of cane in 1850, the real damage sustained in consequence of the last overflow, was the loss of the labor of eighteen slaves during part of the year, the injury to the land and buildings, the loss of interest upon the capital, and the delay of one year in establishing the place as a sugar plantation. It is true, the jury were not restricted to the allowance of such damages as would merely indemnify the plaintiff for the injury actually proved, but we think, that under the discretion vested in them by the third paragraph of article 1928 of the code, the exemplary damages allowed should bear some proportion to the real damage sustained, and that the verdict should not have exceeded \$5000; to this amount the judgment must therefore be reduced.

It is ordered, that the judgment in this case be reversed. It is further ordered, that there be judgment in favor of the plaintiff against the defendant's, executors of *John McDonogh*, for the sum of five thousand dollars, payable in due course of administration. The costs of the district court to be paid by the defendants; those of this appeal by the plaintiff and appellee.

Application for re-hearing refused.

**ROBERT PEALE et al. v. T. P. WHITE.**  
**STATE OF LOUISIANA v. JUDGE OF THE FIFTH DISTRICT.**  
**T. P. WHITE, Praying for a Writ of Mandamus.**

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The bequest of the interest of a fund in perpetuity, when the naked property in the fund is given to no one else in express terms, is evidence of the intention of the testator to bequeath the fund itself; and the meaning of the words used, should be ascertained with reference to that intention.

If the deceased was a resident of England, transiently passing through our country, the disposition of his personal property, according to the laws of England, would be valid; but if the deceased was domiciliated in Louisiana, his personal property was domiciliated here with him, consequently he was obliged to dispose of it according to the laws of this State.

The executor is not bound to deposit in bank the government stocks, nor the bills receivable, of the succession which he administers.

The money of the succession was inconsiderable, being not more than enough to pay expenses. The failure of the executor under these circumstances to deposit it in bank, is not a sufficient ground for removing him.

**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Grymes, Winthrop and Josephs*, for plaintiff. *Roselius and Livingston*, for defendant. By the court:

PRESTON, J. *John Peal* died in this city in July, 1839. On the 7th of that month, he made a will before a notary public, which was duly proved and registered in the Fifth District Court of New Orleans, and the execution thereof was ordered.

By the will he gave to his wife, *Isabella Wilson*, one hundred pounds sterling, per annum, during her life.

He gave and donated to the general school fund of High Heskett, in Cumberland county, in England, the total amount of the interest of his estate, real, personal and mixed. And in the event of the death of his wife, he willed, that the hundred pounds sterling, bequeathed to her annually, should be merged in his estate, and the interest thereof be enjoyed by the general school fund of High Heskett.

He appointed *Thomas P. White*, of New Orleans, his executor, with seizin of his estate. He also appointed three executors residing in High Heskett, in England. They have not qualified in this State.

The father, brothers, except one, and sisters of the deceased, have established their relationship to him, and caused themselves to be recognized as his heirs. They have caused the executor here, to render an account; have had him dismissed, because he did not keep the funds of the estate in a bank paying interest on deposits, as required by the Act of 1837. They also attacked the validity of the will, for many reasons, and succeeded in having it annulled by the district court, for one which is thus stated: "Because no definite and ultimate destination is made of the property of the testator, the interest thereof only being bequeathed." The court came to the conclusion, that a perpetual trust was created by the will, for the benefit of a third person, which is illegal in a testamentary devise in Louisiana, where the will was made and the property

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WHITE.

is situated; and, at all events, that *White* was not the trustee. Moreover, that no disposition of the capital of the testator's estate was made, but only of the interest.

It does not appear where the deceased resided. His property was entirely personal, consisting of government stocks, bills receivable, and a small sum of money. If the deceased was a resident of England, transiently passing through our country, the disposition of his personal property, according to the laws of England, would be valid. And the official knowledge we have of those laws, enables us to say, that the bequests in controversy, are in conformity to the laws of England.

But if, as the district court considers the case, and the executor has not proved the contrary, the deceased was domiciliated in Louisiana, and, consequently, his personal property was domiciliated here with him, he was obliged to dispose of it according to our laws.

The father is a forced heir for one-fourth of the property, was entitled to an account, and to have the executor dismissed, under the Act of 1837, for failure to keep the money of the estate in bank, or even the court might dismiss him *ex officio* for that cause.

But the difficulty is, that it does not appear by the record before us, that the executor has any money in his hands. The succession consists mostly of government stocks and bills receivable. The executor was not obliged to deposit them in a bank paying interest on deposits, because the bank would not pay interest on them. Nor was the deposit indispensable even for safe keeping. The executor, for the first year of his administration, and his security, after the first year, being responsible for the safety of the stocks and bills. The money was inconsiderable, not more than necessary to pay expenses. The record does not, therefore, present a sufficient evidence to justify the dismissal of the executor, and his punishment under the Act of 1837.

The year of his executorship having expired, the court should require him to give security according to law; and, in default thereof, dismiss him and appoint a dative executor.

The testator disposed of his estate in favor of a wife in England, and a school at High Heskett, in Cumberland county, in that kingdom. This evidently shows, that he intended, that all his effects should be sent there, and he appointed executors there to receive them. If there is nothing illegal in this disposition of his estate, we think the court should, as far as depends upon it, carry the will into effect.

I am of opinion, that there was nothing illegal in the devise, especially as it was to be executed in England. The testator created a capital sufficient to yield his widow, in England, an income of 100 pounds a year. This was a lawful bequest in favor of one for whom he was bound to provide.

He directed the remainder of his estate, in effect, to be capitalized, and the interest to be paid to the general school fund of High Heskett forever. It is my opinion, that the devise of the interest of a fund perpetually, is a devise of the fund itself. It has been so held in England and Massachusetts. 6 Watts, 14. *Garret v. Rex*, 6 Mass. Rep. 37. It is a reasonable interpretation of a bequest, and the only one by which the general principle, that the intention of the testator must be ascertained, can be carried into effect. The bequest was also a most useful disposition. He appointed executors in England, evidently to receive his estates, and carry these laudable dispositions into effect. The



executors could easily do so in England, and the administration of the high school, accept and receive the interest on the estate. If the school had been established in this State, the administrators could, under the 1536th article of our code, have accepted it, and received the interest of the capital, which the executors might constitute out of the estate. It is true, the article is placed under the section of the code, which treats of donations *inter vivos*; but the principle is equally applicable to the acceptance of testamentary dispositions. I know, that equally wise and liberal principles of law exist in England; and, as the devise was in favor of an institution for education, which, I am bound to presume, is intended, like all such institutions, to be perpetual, the means provided to aid in its support, might, in like manner, be of a perpetual character.

I think the case should be remanded, with directions to ascertain whether or not the testator was an Englishman transiently on our shores; and, if so, to carry the will fully into effect. But if, on the other hand, the court finds that the deceased was a resident of Louisiana, having acquired residence either by a year's residence or an intention manifested to reside here permanently, that in that event, he distribute one-fourth of the estate to the father of the deceased; and that the balance be held by an executor or deposited safely in a bank, subject to the order of the executors in England, when duly qualified.

It is therefore ordered, adjudged and decreed, that the judgment of the court below be reversed, and the case remanded for further proceedings; and in conformity to the views expressed in this opinion, the succession to pay the costs of the appeal.

ROSE, J. I concur in the decrees about to be made in these two cases, Nos. 2418 and 2699, for the following reasons. I am of opinion, that the bequest of the interest of a fund in perpetuity, when the naked property in it is given to no one in express terms, is evidence of the intention of the testator to bequeath the fund itself, and that the meaning of the words used, should be ascertained with reference to that intention. 1 Prudhom, p. 4, No. 8. Dalloz, *Verbo Usufruit*. Rolland de Vilargues *verbo* Usufruit.

If the bequest of the interest in property, is to be considered in law as a bequest of the fund itself, there is no perpetuity created in any sense, and the only questions remaining, are those depending on the place of domicile of the testator, and the capacity of the Heskett school to take under the will, which is not proved to my satisfaction.

Taking into consideration the facts, that the money of the succession was not much more than sufficient to pay the expenses of administration, I am of opinion, that until the will is set aside, at least in part, the executor cannot be removed from office, at the suit of the plaintiffs, because they have no interest in the succession. The judgment dismissing the executor, must therefore be reversed, and the case remanded to abide by the decision on the main issue.

### JOSEPH FELLOWS v. RICHARD HIGH and W. and J. LOCKETT.

In an action against the owners of a vessel for damages, resulting from the improper conduct of the master to a passenger, the owners cannot be brought into court by a service of the citation on the master, or on the consignees.

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v.  
HIGH.

**A**PPEAL from the Fifth District Court of New Orleans. This case was tried by a jury before *Buchanan, J. Edwards and Rand*, and *C. Roselius*, for plaintiff. *Huntton and Bradford*, for defendants.

**EUSTIS, C. J.** A majority of the court is of opinion that the defendants, *John and William Lockett*, who are appellants, were not legally cited by the service of the citation on the captain of the bark *Acteon*, or by the service of the citations on *Holmes and Mills*. And the said appellants not having made themselves parties to the record, by any appearance in person, or by an authorized attorney, the judgment against them is not valid.

It is therefore adjudged, that the judgment of the district court be reversed, and the plaintiff's suit be dismissed, with costs in both courts.

**PRESTON, J.** dissenting. The plaintiff obtained a verdict against the master and owners of the bark *Acteon*, for five thousand dollars damages, for the violation of their contract to convey his two daughters, as cabin passengers, on board their vessel from Liverpool to New Orleans. They were girls, sixteen and twelve years of age, just from school, and were placed under the care and protection of the master, who, instead of affording them the comfort and security implied in his contract, exercised towards them indignities which amounted to atrocious outrages, and almost drove those children to desperation. The evidence, believed by the jury, so fully justifies the verdict as to the master, that it is unnecessary to recapitulate it, especially as much of it is of a disgusting character.

The responsibility of the owners of vessels, as to passengers, is settled in the cases of *Keene v. Lizardi & Co.*, *Arroy v. Carrell*, and *St. Amand v. Lizardi & Co.* 5 L. R. 433. 1 L. R. 537. 4 L. R. 244. They are responsible for all damages done by the master, while acting within the scope of his power, and even for his torts. When carrying passengers, for money, the owners of vessels are subject to the same responsibility for a breach of duty, by the master, towards the passengers, as for their misconduct in regard to merchandise.

The owners of this vessel are, therefore, liable for the gross violation of contract, by their master, to these passengers, if they are properly before the court.

They are residents of Great Britain, and were cited only through the master in this city. They contend, that the citation was a nullity as to them, because the process should have been served personally, or at the domicile of the defendants.

In the case of *Gazzam v. Wright*, it was said by the late Supreme Court, that "in certain cases, when the owner resides out of the State where the suit is brought, he may be legally cited by service of process on the captain." I am under the impression that the article 199 applies to a master of a vessel in his capacity of master, and not in his individual capacity. And that service is to be made upon him for all contracts, negligence, or even malfeasance, in the line of his duty. I can conceive of no case where the service would be sufficient, except when the owner is responsible for the contract or conduct of the master, and if sufficient in any, it must be so in all such cases.

I yield to the opinion of the late Supreme Court. The owners and master are responsible *in solido* in such cases. The master is allowed to sue in a foreign port on behalf of the owners of his vessel, when, by his act or contract, a right accrues in their favor; *vice versa*, I can see no reason why he should not be sued on their behalf when a liability is incurred by them, from his acts within the scope of his employment as captain.

Counsel appeared in this suit to protect the interest of the owners. They were no doubt informed of the suit long before it was tried. Had the owners appeared, dismissed the master, disavowed all his conduct, so far as by presumption of law it bound them, I should have thought the verdict against them should have been almost nominal. Instead of dismissing the master, and offering some atonement to a father for the injuries to his children, while protecting their interest, joined in a course of examination and cross-examination of witnesses not necessary to their protection, but calculated to aggravate his already deeply wounded feelings.

It is our duty to recommend moderation to juries, to administer justice in mercy, and to refuse vindictive damages wherever it is possible. And we would have approved of a distinction in this case, between the master and his employers; but since the jury, having the whole case and its conduct before them, and especially the mass of unnecessary and aggravating testimony on behalf of the defendants, did not see proper to make a distinction, we do not feel authorized to interfere with their decision.

I think the judgment of the district court should be affirmed, with costs.

### GARDNER, SAGER & Co. v. O'CONNELL AND GOULD.

The court will not grant a continuance on the ground that a commission has not been returned, where the application for the commission was not made in time.

**A**PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Grymes and Lee, and Roselius*, for plaintiffs. *Huntton and Bradford*, for defendants. By the court:

PRESTON, J. The plaintiffs bring this suit against the defendants for the price and charges of a large lot of corn, purchased by their order, on their account, and consigned to them, at Liverpool, by the ship *Edinburgh*, in May, 1847.

The suit was instituted on the 4th of February, 1850. The defendant, *Gould*, after a judgment by default, filed for answer a general denial, on the 27th of that month. The cause was tried on the 13th of January, 1851.

The defendant moved for a continuance, on the ground that he had not yet obtained his evidence. He made affidavit that he had, in September, obtained a commission to examine witnesses in Liverpool, which had not yet been returned, and complained that the commission had been delayed sometime for the want of plaintiffs' cross-interrogatories. We find, in the record, no order for a commission, but suppose it issued; yet, as it must have issued, as appears by defendants showing, five or six months after the cause was at issue, the failure to obtain its return could not be a sufficient reason for a continuance of the cause. Besides, deducting the delay caused by plaintiffs' counsel to cross the interrogatories, there was ample time, for the execution and return of the commission, before the cause was tried.

Under the circumstances presented, the absence of defendants' counsel, when the cause was called for trial, was not a sufficient ground for its continuance. The defendant was assisted by counsel, and he had no evidence which should have produced a different result if his counsel had been present.

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It was impossible for the district judge, without entirely disregarding the principles of law and rules of practice, so as to have subjected his court to whatever parties might in future demand, to have granted a continuance; and, as the same grounds, substantially, were presented in support of the application for a new trial, they are untenable.

And yet, from proceedings in the case, from papers spread upon the record, though not in such a manner as to have enabled the district court to have proceeded otherwise than it had done, we have reason to fear that the defendant, an unfortunate stranger, has been hardly dealt with in the whole business, and if the laws enabled us, consistently with the practice and precedents of courts, to afford relief, we would certainly endeavor to do it. We have no power, however, to reverse the judgment, as the case is presented by the record.

The judgment is affirmed, with costs.

### HENRY BUCHANAN v. H. R. MORGAN et al.

J sold lots to W, who recorded his deed. W resold to J, who did not record his deed. J, several years afterwards, sold the lots to H, who sold them to T, who sold them to plaintiff, who paid taxes upon them, and assumed in every respect, the responsibilities of possession and ownership. The titles of H, of T, and of plaintiff, were duly recorded. The defendant seized the lots to satisfy a judgment obtained against W, after the plaintiff had acquired title. Plaintiff enjoined the sale. *Held*: The failure of J to record the reconveyance to him, was cured by the subsequent conveyances and possession under them; and the plaintiff's title was valid against the creditors of the original owner, W.

**A** PPEAL from the District Court of the parish of Jefferson, *Clark, J. Wolfe and Singleton*, for plaintiff.

*Durant and Horner*, for defendants. By the act of March 25th, 1810, chapter 25th, section 7, it is "provided that no notarial act concerning immovable property, shall have any effect against third parties, until the same shall have been recorded in the office of the judge of the parish in which such immovable property is situated." Bullard's Digest, p. 596. This law is not repealed.

*Carraby v. Desmarre and the Sheriff*, 7 M. N. S. 661. *Gravier v. Barron et al.*, 4 L. R. 239.

By the act of 1st June, 1846, (Session Acts, p. 71,) the parish recorder is register of conveyances, and exercises all the powers, and performs all the duties that appertain to public notaries in general, and to the parish judges when acting in the capacity of public notaries. Sections 1 and 3 of the act quoted.

The law, then, being plain, clear, and indisputable, it follows, that as to *Henry R. Morgan* and the sheriff, the defendants herein, the act of sale from *Albert Wintercast*, of the 19th June, 1844, has no effect, because it was not registered in the office of the register of conveyances, until long after the property had been seized by *Morgan* on his execution against *Wintercast*. See, also *Hagan v. Williams*, 2 L. R. 122. *McManus v. Jewett*, 6 L. R. 531. *Mary v. Lampré*, 6 R. R. 314. *Crear v. Sowles*, 2 Ann. 598. *Tulane v. Levinson*, 2 Ann. 787. *Tate v. Williams*, 2 Ann. 868. *Stockton v. Craddick*, 4 Ann. 286. *Campbell v. Slidell*, 5 Ann. 274.

By the court: (*Slidell, J.*, dissenting.)

*EUSTIS, C. J.* The plaintiff obtained an injunction against the sale of two certain lots, situate in the former Nun's faubourg, in the parish of Jefferson, which had been seized under an execution against *Albert Wintercast*.

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The district court maintained the injunction, decreeing the lots to belong to the plaintiff, and not to be subject to the judgment against *Wintercast*. The defendant, who is the judgment creditor of *Wintercast*, has taken this appeal.

On the 3d of October, 1843, *O. P. Jackson* sold the lots to *Wintercast*, by public act, which was duly recorded. On the 19th of June, 1844, *Wintercast* reconveyed the lots to his vendor, *Jackson*, by public act, which was not recorded. On the 14th of December, 1848, *Jackson* conveyed the lots to *Hyde*. *Hyde* conveyed them to *Thomas*, and *Thomas* to the plaintiff. These three conveyances from *Jackson* to *Hyde*, *Hyde* to *Thomas*, and *Thomas* to the plaintiff, purport to be sales for a valuable consideration, and were by public act duly recorded in the parish of Jefferson.

The ground, on which it is contended the lots are subject to the judgment and execution against *Wintercast*, is, that the act of sale from *Wintercast* to *Jackson*, was never recorded as required by law. The district judge was of opinion, that this defect was cured by the registry of the subsequent acts, and the possession under them; and on the authority of the case of *Stockton v. Briscoe*, 1 Ann. 249, held the plaintiff's title to be valid against the creditors of the original owner, *Wintercast*.

The judgment under which it is attempted to affect the property in the hands of the plaintiff, was not rendered until April, 1851; the debt in which it was rendered, only originating in September previous, in the city of New York. By the act from *Wintercast* to *Jackson*, in 1844, *Wintercast* divested himself of possession of the lots in favor of *Jackson*, who acknowledged himself to be in possession thereof. In 1849, they were assessed in the tax roll as belonging to *Hyde*, and in the assessment of 1850, as the property of the plaintiff.

The law considers the tradition of real property, as accompanying the public act of sale, and every obstacle to the corporal possession interposed by the seller, is held to be a trespass. Code, 2455.

The vendors of the plaintiff, had not only the possession resulting from the sales, but stood upon the tax records of the State as owners of the property, and openly assumed the responsibilities and charges of possession and ownership. Under the principles recognized by this court, in the case of *Poydras v. Lawrans*, 6 Ann. 771, and cases there cited, the decision of the district court is clearly right.

The judgment of the district court is therefore affirmed, with costs.

SLIDELL, J., dissenting. By the act of March 25th, 1810, chapter 25th, section 7, it is "provided, that no notarial act concerning immovable property, shall have any effect against third parties, until the same shall have been recorded in the office of the judge of the parish, in which such immovable property be situated.

By the Act of 1846, p. 71, (the office of parish judge having been abolished,) the office of parish recorder was established.

My views on the subject of registry, in cases not characterised by fraud, have differed from those of my brethren. I stated them at some length, in *Stockton v. Briscoe*, 1 Ann. 249. They have undergone no such change in any particular, as would enable me to concur in the decree in the present case; but I do not conceive it suitable to state them again at length. I, therefore, refer to what I then said, and to the cases cited below.

The doctrine, that an omission to register, is cured by the registry of a subsequent title, accompanied by possession, has always seemed to me dangerous,

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particularly with regard to uncultivated lands, or vacant lots in towns or cities. I do not see how, under this theory, an individual can safely buy, or a bank or capitalist safely loan money, upon unimproved lots, or uncultivated lands. The common course of examination of title, by the attorneys of banks and individuals, has been to trace the title down by a satisfactory chain of conveyances, to the person proposing to sell or mortgage, and obtain from the recorder or register, certificates of freedom, from sales or mortgages by him; and the more cautious, properly take like certificates as to the antecedent proprietors. But upon the theory of *Stockton's* case, it would be necessary to have a general search, to see if any individual, other than the proposed vendor or mortgagor, had sold or mortgaged the property in question. A recording officer might, I think, lawfully refuse to give such a certificate. But if he were willing to undertake such a search, the labor of weeks would be required in New Orleans for one certificate, and the duties of the office would become impracticable. A strict construction of the registry laws, must undoubtedly result in cases of individual hardship. But will not the opposite interpretation, lead to results equally, or even more dangerous? Under the former, the diligent are safe. Under the latter, the assurance of safety, is almost an impossibility. Aside, however, from the consideration of results, what is the legal meaning and effect of the very stringent language of the statute? See *Carraby v. Desmarre*, 7 N. S. 661. *Gravier v. Barron*, 4 L. R. 239. *Hagan v. Williams*, 2 L. R. 122. *Mary v. Lampré*, 6 R. R. 314. *Tulane v. Levinson*, 2 Ann. 787. *Crear v. Soules*, 2 Ann. 598.

I am not aware that our jurisprudence makes a distinction in this matter, (which the statute does not make) between a judicial mortgagee, and a conventional mortgagee, between a creditor who attaches, and a purchaser who buys from the vendee, who has already sold by a deed, which the previous buyer had neglected to record.

What would be the effect of actual possession for a length of time sufficient under the code, to form the basis of a plea of prescription, is a question not presented in this cause.

The natural equity of this case, is against the defendants; but I think the law is in their favor.

### A. T. STEWART v. W. M. and J. LAPSLEY.

A debtor, in embarrassed circumstances, cannot lawfully place his property out of the reach of his creditors, nor be justified in distinguishing between them, and leaving the debts arising from his endorsements unsatisfied. And it makes no difference whether a sale, made to accomplish such illegal purposes, was advantageous or not to the creditors. Articles C. C. 1964 and 19, cited and applied.

**A**PPEAL from the Second District Court of New Orleans. This case was tried by a jury, before *Lea, J. T. B. Hart*, for plaintiff. *C. Roselius*, for defendant. By the court: (*Slidell, J.*, dissenting.)

*Rost, J.* We have reason, from the perusal of the record in this case, to be fully convinced, that the *Lapsleys* were insolvent when they sold their entire stock in trade to *Turner*, on long terms of credit, and without security; that the object of the sale was certainly to delay, and probably to defeat, the plain-

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tiffs, and others of their creditors, in the pursuit of their legal rights, and that *Turner* was apprised of their situation, and of the object they had in view, when he purchased. The only question left doubtful by the evidence is, whether the sale was fraudulent or simulated. And, although it might be important to ascertain its true character, if *Turner* claimed, in kind, the goods taken by the sheriff in execution, that question is not material to the issue which the case presents.

The goods have been sold by the sheriff. *Turner* sued in affirmance of the sale, and claims damages, alleged to have been sustained by him in consequence of it. He must, as other litigants, come into court with clean hands; and it is enough to defeat his action, that he was a party to the fraud perpetrated by his vendors, and had notice of it.

The verdict would have done injustice to the plaintiffs, if the sale from *Lapsley* to *Turner* had been a fair and honest transaction, and can only be accounted for by the delusion, which seems to prevail among all classes, that when a debtor finds himself unable to meet his engagements, and is hard pressed by some of his creditors, he may lawfully place his property out of the reach of legal process, and constitute himself, as it were, his own syndic. Nay, the delusion does not stop there. Out of the proceeds of the property thus made away with, the debtor is considered justified in distinguishing between his creditors, and leaving the debts arising from endorsements, unsatisfied. The testimony of the defendant, *Turner*, was given under the influence of that delusion. His witnesses testify, that the course pursued by the *Lapsleys*, in selling their stock as they did, was to the best of the interests of their creditors; and the jury evidently acted upon that testimony. In this the error of the verdict consists; whether the sale was advantageous to the creditors generally, or the reverse, was not the question before them.

Every act done by a debtor with the intent of depriving his creditor of the eventual right he has upon the property of such debtor, is illegal, and aught, as respects such creditor, to be avoided. C. C. 1964.

When, to prevent fraud, the law declares certain acts void, its provisions are not to be dispensed with, on the ground that the particular act in question has been proved not to be fraudulent. C. C. 19.

The avowed object of the sale being to delay the plaintiffs in the pursuit of their legal rights, came within art. 1964; and the jury were precluded by art. 19 from inquiring whether or not the sale was fraudulent.

We differ with the jury as to the good faith of the *Lapsleys*. They had abundant means of protecting the rights of the other creditors if they had really intended to do so. If, as they wrote to them, they only wanted time, they should have applied for a respite. If, as we believe, they were hopelessly insolvent, it was their duty to have made a voluntary surrender of their property. Any act beyond these remedies, by which the rights of individual creditors on the property of their debtor are intentionally delayed, or in any manner interfered with, is illegal; and no claim in damages or action of any kind can be predicated upon it, by any party to that act having knowledge of the intention.

It is therefore ordered and decreed, that the judgment in this case be reversed, and that there be judgment in favor of the plaintiffs in the original suit, and against the defendant, *Turner*, with costs in both courts.

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### SAME CASE—ON AN APPLICATION FOR A RE-HEARING.

By the court: (*Slidell, J.*, absent.)

*EVERIS, C. J.* The counsel for the appellees has asked for a re-hearing in this case, on the ground that the sheriff had no right to make the seizure of the goods in the store, even if the sale was fraudulent; and that, consequently, nominal damages must be due for this illegal act.

Conceding this to be true, the damages, under our view of the case, would be strictly nominal, for a sum over which the court of the first instance would not have jurisdiction.

We therefore, according to the uniform usage, give a party nothing, where his right amounts only to so small an amount, of which the law scarcely can be said to take heed. Those demands can be recovered before justices of the peace; but the higher courts ought not to be occupied with them.

The re-hearing is therefore refused.

### R. D. SHEPHERD v. MARK PHILLIPS & Co.

It will be presumed, unless the contrary appear, that all the parties to an agreement had knowledge of their legal rights; where, therefore, there are ambiguities and conflicting stipulations in the agreement, and one party claims the waiver of a legal right by the others, in his favor, the ambiguity will be construed against the party claiming the benefit; for it was incumbent on him to have given such explanations, at the time of entering into the agreement, as would have prevented the doubt.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. A. K. Josephs*, for plaintiff. *E. Briggs*, for defendant. By the court: (*Slidell, J.*, absent.)

*ROST, J.* On the 20th May, 1846, the following agreement was entered into by the parties to it:

"It is hereby agreed between the undersigned, mortgage creditors of the Orleans Cotton Press Company, for the following sums, viz: *R. D. Shepherd*, four judgments in Fifth District Court, for about \$205,000; *J. Y. de Egana*, one judgment in Criminal Court, for about \$36,000; *John Slidell*, one judgment in Commercial Court, for about \$15,000; *Mark Phillips*, one judgment in Commercial Court, for about \$20,000; *Sam'l Nicholson*, one judgment in Commercial Court, for about \$6,000, and that execution shall be issued on said judgments, and said *R. D. Shepherd* is hereby authorized and empowered to purchase at the sheriff's sale, for the account of the undersigned, in his own name, all the mortgaged property described in the several acts, and which is bound for the payment of the above claims, to be held and disposed of by him for their account, and each of the undersigned is to be interested in said purchase in proportion to the amount of his claim; and, to the end aforesaid, the undersigned do further authorize and empower the said *R. D. Shepherd* to raise their several mortgages and judgment claims now due, so as to meet the cash payment required



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at the sale to be made as aforesaid; and in the event of a resale to a profit to said *R. D. Shepherd*, which resale, at profit, he is hereby authorized to make, such profit shall be ratably divided as aforesaid; and should any future difficulty arise between the parties as to the partition of said property or its proceeds, in relation to any priority of lien or mortgage, that may be claimed by one or more of them over the other, such difficulty shall be made the subject of an amicable suit, to be submitted, by consent, to the Supreme Court for decision. It is well understood, that the said *R. D. Shepherd* should not bid for the property, up to the whole amount of the claims of the undersigned; and if the property is bought in for less at the sale, yet, as between the undersigned, it is to be considered as having been purchased at the amount of the entire claims, so as to leave each one interested in proportion to his claim, and to avoid, as far as possible, between themselves, any question of priority of rank between them. In faith whereof, they have hereunto signed their names, this 20th day of May, 1846. This agreement, as soon as signed, to be deposited with *H. B. Cenas, Esq.*, notary public, for safe keeping. Signed: *R. D. Shepherd*; *Mark Phillips* by *A. & J. Dennistoun & Co.*, agents; *J. Y. de Egana*; *John Slidell*, for *H. C. Cammack*; *Sam'l Nicholson*."

Under this agreement *R. D. Shepherd* purchased, in his own name, the property to which it refers, for the price of \$270,000, which, after deducting costs and arrears of taxes, left the sum of \$266,744 55. subject, according to the sheriff's return, to such distribution as the court might make between the creditors of the company. The plaintiff has since had the management of the property, and has purchased the claim of *Phelps, Dodge & Co.*, the party represented in the agreement by *Sam'l Nicholson*, for the common benefit of the other parties to that agreement. He has now in his hands, for distribution among the shareholders, a sum of \$15,541 27, proceeding from the rents of the property.

He has made a distribution of it among the shareholders, on which the dividends are in proportion to the amount of their respective claims, without regard to the priority which some of those claims have over others, but as his construction of the agreement is at variance with that of the other parties, he has instituted this proceeding for the purpose of ascertaining the proper division of the property and its revenues among the shareholders.

The latter have appeared, and oppose the distribution made, on the following grounds: That the stipulation in the agreement, that the price should be considered as between themselves, the amount of their claims had necessarily reference to those claims as recognized and settled in the form provided in the agreement itself. That by a decree of the Supreme Court, rendered on a rule to which all the parties hereto were also parties, these several claims were finally liquidated, and it was decreed, that the holders of the bonds of the first series were entitled to be paid in preference to the holders of the second series, whose mortgage had never been reinscribed. That under the judgment in that case, the holders of the bonds of the second series were entitled to a dividend of 29½ per cent on the sum of \$23,902 24, the balance of the purchase money after paying the claims to be declared to be of higher privilege; that of the amount claimed by the plaintiff, \$56,657 63 is claimed for bonds of the second series, and, for which, under the decree, he is only entitled to the sum of \$16,855 44. That the decree of the Supreme Court finally settled the interest of the parties, and forms *res judicata*.

They pray that their shares in the property and its rents, be fixed according to the principles of that decree.

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The case was submitted to the district judge, without argument, and the judgment rendered was in conformity with the prayer of the petition. The defendants have appealed.

The different stipulations of the agreement, cited on both sides, seem to be in direct conflict with each other; and if, in endeavoring to construe it, we should fail to reach the common intent of the parties, they alone will be to blame for having created a state of things to which rules of law cannot be applied with any degree of certainty.

The stipulations upon which the plaintiff relies, seem to imply a waiver of any right of priority by the purchasers. But if a waiver was intended, why was it not expressed in the act. So far from this being the case, it is stipulated, that should any difficulty arise between the parties, in relation to any priority of lien or mortgage that may be claimed by one or more of them over the others, such difficulty shall be made the subject of an amicable suit, &c.; and, further, the purchase shall be considered as having been made for the whole amount of the claims of the purchasers, to avoid, as far as possible between themselves, any question as to priority of rank. This expressly reserves the question of priority, which the other stipulations seem to waive, and hence the difficulty which the case presents.

It is not pretended that the agreement was entered into under the influence of any error of law or fact, by any of the parties to it. I must, therefore, take it for granted, that they were all apprised of their legal rights, and that the plaintiff had knowledge that the claims of the defendants were entitled to the preference over so much of his own, as rested upon bonds of the second series. He now insists, that the agreement is a waiver of the right of priority, made by the other parties, for his benefit. Under those circumstances, I am of opinion that it was incumbent upon him to have given such explanations, at the time, as would have prevented doubt or ambiguity; and, as he failed to do so under the express provision of article 1953 of the Civil Code, the construction most favorable to the defendants should be adopted.

The purchase was made on the 29th June, 1846. On the 3d of July following, the counsel of plaintiff, on informing the court of that fact, and suggesting that the certificate of the recorder of mortgages shows a large number of bonds, secured by mortgage, on the property sold, besides those sued upon by the said *Shepherd*, the plaintiff in the suit, and, in order to determine among all the bondholders and mortgage creditors, their respective claims for priority fully and finally, as well as to obtain the erasure of said mortgages, took a rule on all the mortgage creditors of the company, except the defendants in this suit, to show cause why their mortgages and privileges should not be erased, on the ground of the priority of the mortgages of himself and the defendants. He did not ask that the defendants should be cited, but he prayed for citation against *Phelps, Dodge & Co.*, one of the parties to the agreement, and entitled under it to the same rights as the plaintiff, although not a judgment creditor.

The defendants, though not cited, appeared, as well as *Phelps, Dodge & Co.*, by separate counsel, and each litigated his claim against all the other creditors, the plaintiff among the rest. Upon the separate issues thus formed, and having all the essential characteristics of a proceeding in *concurso*, a judgment was rendered by the district court, recognizing the right of the plaintiff to be paid by preference, the amount of his judgment on bonds of the second series, rejecting the claim of *Phelps, Dodge & Co.*, and ordering their mortgage to be erased upon

the books of the recorder. *Phelps, Dodge & Co.* and other creditors appealed, and an agreement in relation to the manner of bringing up the record, was signed by the counsel of each creditor.

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On the appeal, the contestation was renewed in this court; the judgment giving a preference to the plaintiff, over *Phelps, Dodge & Co.* and other holders of bonds of the second series, was reversed. His reinscription was adjudged not to be valid, and his claim ordered to share *pro rata* with those of the other holders of the same series of bonds. 2 Ann. 100.

This judgment was in a suit instituted by the plaintiff himself. All the parties to the agreement were parties to it, and as it is *res judicata* as to *Phelps, Dodge & Co.*, who have the same rights as the plaintiff under the agreement, and it is conceded that they have only received for their claim the dividend which that judgment allows them, it is extremely difficult to avoid the conclusion, that the judgment has also finally determined the question of priority against the plaintiff, and in favor of the defendants.

The rule did not give the court to understand, that the question of priority was not open between the purchasers of the property, or that it had been waived by them. It was expressly taken in order to determine, among all the mortgage creditors, their respective claims for priority fully and finally, and represented the question as open in relation to the claim of *Phelps, Dodge & Co.* If open as to them, it must have been equally so as to all other parties to the agreement, and the judgment should have the same effect as to all.

If the plea of the thing adjudged could not, on technical grounds, be maintained, yet, as showing the interpretation put by the plaintiff, upon the agreement, the proceedings on the rule would be sufficient to bind him. He made no reservation of any rights he might have under that agreement, and, in my opinion, waived those rights by testing the claim of *Phelps, Dodge & Co.*, in all respects similar to his own, and suffering a judgment to be entered against him, in favor of his co-purchasers, on the question of priority.

I am of opinion, however, that, under the agreement, two hundred and eighty-two thousand dollars should be considered the price of the adjudication of the cotton press, and that the rights of the parties in this suit should be settled on that valuation.

It is therefore ordered, adjudged and decreed, that the judgment of the lower court be reversed, and that the rights of the parties to the agreement which forms the subject of this litigation, in the property of the press, be settled and established on the following basis: The press was purchased at \$282,000. From this amount is to be deducted, 1st. The claims preferred to those of the parties, consisting of charges and privileged claims, as per tableau of distribution, \$25,387 43. 2d. Those of the holders of the first series, paid in accordance with tableau, \$5,516 19 = \$30,903 62, leaving \$251,096 38. 3d. Amount of the dividend paid to the holders of the third series, not parties to the agreement, \$7,028 64. Balance to be distributed between parties to the agreement, \$244,067 74. Of this two hundred and sixteen thousand two hundred and eighty-one dollars and forty-nine cents, was contributed by the holders of the bonds of the first series, to wit: *R. D. Shepherd, Lizardi & Co., John Slidell and Mark Phillips*, under the decree as per tableau, leaving as a dividend due to *Mr. Shepherd*, as holder of bonds of the second series, twenty-seven thousand seven hundred and eighty-six dollars and twenty-five cents, instead of sixteen thousand eight hundred and fifty-five dollars and forty-five cents. And, it is further ordered, that

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the dividends due on the several interests, be distributed accordingly, in the account filed, so far amended; and that the appellees pay the costs of this appeal.

PRESTON, J., concurred.

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### ON AN APPLICATION FOR A RE-HEARING.

By the court:

ROST, J. The petition for a re-hearing in this case appeared to me deliberately offensive, but as my brethren were willing to act upon it, I have perused it with great care.

The perusal has not been unattended with advantage, as it has fully satisfied me of the correctness of the judgment.

The counsel regrets to be compelled to raise a direct issue of fact with the court. Any body may raise issues of fact with us, but the question on every particular case is, whether it can be fairly done; the issue of fact raised in this case, does not rest on truth, but on mere verbal criticism, to which all judicial opinions are more or less obnoxious. The opinion assumes, that the plaintiff knew his rights, because it was no where alleged or shown that he had not. But suppose that all the parties to the agreement contracted in ignorance of their legal rights as to priority. Still, under the view which the counsel takes, it was intended to benefit some of them; and after it was ascertained by the judgment of classification of the mortgages, that the plaintiff was the party protected by it, and he claimed that protection, it was true to say, that he claimed a waiver of the right of priority, made by the other parties, for his benefit; if not nominally, at least, substantially under the decree of the court; and whether he knew his rights originally or not, the rule of law invoked against him is equally applicable.

It may be true that the agreement was the work of the other parties as well as his own; but the difference between them is, that they claim nothing under it, and he does. They say that the leading object of it was the purchase of the cotton press; that this object has been attained, and they are satisfied with the position given them by the judgment of classification. If they sought to disturb that judgment, under the agreement, they would fail, for the reasons which have caused the failure of the plaintiff.

The court had not the most remote intention in applying article 1953 of the code to the case, to charge the plaintiff with concealment or bad faith. First: because we know him to be incapable of either; and, next, because we considered that if the common intent of the parties was as now represented, his adviser alone was to blame for not having placed the matter beyond doubt in the agreement, and for having caused the rank of the mortgages to be finally determined between all the creditors, without reference to it. It was reserved for the plaintiff's counsel himself, to subject his client to imputations which never entered our thoughts. We assumed, in the opinion, that the plaintiff knew that the claims of the defendants were entitled to the preference over so much of his own, as rest upon bonds of the second series.

"So far from this being the case," says the learned counsel, "at the period the agreement was entered into, it was the firm conviction, of all the parties to it, that the bonds of the second series had primed and obtained preference over

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those of the first. It was not until the decree of this court, on the subject, that the parties were apprised of their legal rights." Be it so; and how does the matter stand upon this and another statement of the learned counsel. "He informs us, that the individual interest of the nominal plaintiff, himself a holder of a very large amount of bonds of the first series, is identical with that of the defendants themselves, over fifty thousand dollars of the bonds of the second series having been sent to him, and put in judgment, for account of *Messrs. Morrison & Son*, of London, who are still sole owners of the same, and the only real plaintiffs in this controversy."

The bonds which have given rise to this litigation, belong to *Morrison & Son*, and the plaintiff merely acted as their agent in making the agreement. He had the firm conviction, at the time, that those bonds are entitled to priority over his own, and yet his counsel contends that he entered into an agreement by which he betrayed the confidence placed in him, and enriched himself by renouncing, without necessity, vested rights which he was firmly convinced his principals had. I say, without necessity, because it is not only conceded, but strenuously insisted upon, that the defendants were in his power, and could impose no conditions upon him.

It does not matter what the decree of the court in those rights subsequently was, the morality of the act must be tested by the belief of the plaintiff, at the time, and his counsel cannot maintain his argument without convicting him of a flagrant breach of good faith and common honesty.

If the intention of the parties appeared doubtful, under the agreement, the high character of the plaintiff would justify the conclusion, that he never renounced rights which he could not have renounced without disgrace. But his action in the matter does not rest upon mere conjecture, as I will presently show. Reference has been made by the counsel, on both sides, to the agency of the counsel of *Lizardi & Co.*, in the making of the agreement now at issue; and, as that counsel has no interest in the cause, I have not hesitated to avail myself of his statement in relation to all the occurrences of that transaction. That statement, connected with other facts of indisputable truth, has satisfied me that no trace of this business has remained on the mind of the plaintiff's counsel, and that the common intent of the parties is totally misapprehended by him.

The lands and buildings of the cotton press had cost between seven and eight hundred thousand dollars. Besides the double square actually built upon, there was a batture nearly seven hundred feet front, extending over a hundred feet towards the river, and increasing rapidly. Unimproved property had formerly been selling in that neighborhood at near \$1,000 a foot front, and at the time the sale of the press took place, it was still selling for nearly double what it sells for now. It did not, at first, enter the minds of the parties to the agreement, that the property about to be taken, under execution, would not sell for more than enough to pay the debts of the company; and all the clauses in the agreement but the last, were evidently prepared, under the influence of that belief.

The defendants authorized the plaintiff to purchase the property, and to use their judgments and mortgage claims in any way he might see fit, to meet the cash payment which they anticipated he would have to make over and above the mortgages. Believing further, that by forcing a sale for cash, they would be enabled to purchase the property below its real value, they provided for the case of a resale at an advance, in which the profits would, of course, have been

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ratably divided, if the price given for the property had exceeded the amount of the debts, as they supposed it would.

They considered the necessity of determining the rank of the mortgages as a remote contingency, not likely to happen, but still they made provision for it, and expressly reserved the right. Such a reservation was in all respects consistent with the preceding parts of the agreement; and the argument, that it was intended to refer to new difficulties which might arise from the agreement itself, requires no answer.

The project of agreement had progressed thus far, when it was shown to *Lizardi's* counsel, who thought it ambiguous, and asked the plaintiff and some of the defendants, "if priority was to be waived by them, why the fact was not clearly stated in the agreement?" The answer was, "that some were acting as agents, and were unwilling expressly to bind their principals in that manner." And here I find *Mr. Shepherd* where I was sure to find him; he was agent of *Morrison and Son*, and firmly believed that they were entitled to priority over himself. When asked why he did not waive the right of priority in their behalf, he peremptorily refused to do so, as in honor and good faith he was bound to do, under the belief he entertained.

*Lizardi's* counsel being then informed, and believing that the parties to the agreement were the only parties interested in the proceeds of the sale, suggested that he would draw up a clause which would, as he thought, prevent the question of priority from arising; and he drew up the last clause, providing, that if the property was bought for less than the whole amount of the claims of the parties to the agreement, yet, as between them, it was to be considered as having been purchased at the amount of the entire claims, so as to leave each one interested in proportion to his claim, and to avoid, as far as possible, between themselves, any question as to priority of rank.

*Mr. Shepherd* and the defendants acceded to the proposal, under the belief that the property could not sell below that limit, and that, at that price, it would be an advantageous investment.

This clause was inserted, with the implied understanding that the question of priority was not finally waived. If, as represented to *Lizardi's* counsel, the entire proceeds of the sale had gone to the parties to the agreement, it would have been avoided; but, as under a decree of this court, nearly forty thousand dollars of the price had to be applied to the payment of other debts, it is clear that it remained open, until it was finally closed by the judgment of classification.

The plaintiff was either influenced by the advice of his counsel, or by motives of delicacy, when he proposed to distribute the funds in his hands, in the manner most advantageous to himself. But I am convinced that this mode of distribution would neither be just towards him, nor in conformity with his intention in making the agreement for the purchase of the cotton press.

In conclusion, I will say that I was not at first entirely satisfied with the decision; but, with the statement of the counsel of *Lizardi*, and the new facts disclosed in the petition for a re-hearing, the case appears to me as free from difficulty as any I have ever decided; and I feel no uneasiness as to the authority which the decision is to have hereafter. Re-hearing refused.

EUSTIS, C. J. I regret to be obliged to withhold my concurrence in the elaborate opinion prepared by Judge Rost. My brethren being against granting a re-hearing, after a very elaborate review of the subject, I waive my own convictions, and concur in the refusal.

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GRAY, MACMURDO & Co. v. LOWE, PATTISON & Co. et al.  
 LOWE AND PATTISON v. W. B. PARTEE & Co. AND GRAY,  
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Ambiguous or obscure clauses in the contract of sale, are interpreted against the seller, who is bound to explain himself clearly as to the extent of his obligations. Code, 3449.

Where, under two contracts, the purchaser bought two parcels of drafts, his right to one of the drafts being afterwards questioned, it was held, that his failure to establish by which of the contracts he obtained the draft, did not invalidate his title, where it was clear that he had obtained it under one or the other of the contracts.

The sale of a draft, with a privilege reserved to redeem it within a certain time, is valid.

**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan J. Elmore and King*, for appellants. *A. N. Ogden*, for appellees.

By the court :

EUSTIS, C. J. The manner in which this case is presented to the court, it is immaterial to state or consider. It turns exclusively on the decision of the point on which the district judge decided it. It is thus stated by him :

"Did *Gray, Macmurdo & Co.* acquire the draft sued on, from *W. B. Partee & Co.*, in full ownership, or was it placed in the hands of the former, by the latter, as collateral security for the repayment of a loan? If the former be the fact, the contract, as to the draft, was a sale; if the latter, a pledge."

The article 3125 of the code, provided, that in order to give effect to a pawn of movables, against third persons, the contract must be by authentic act, or under private signature, recorded before a notary, besides requiring certain other matters of form, in order to give it validity. This article was extended to promissory notes. Art. 3225.

These articles prevented the circulation and use of negotiable paper, by way of pledge or security, and limited its negotiability to cases of sale or discount, in which the property in the paper was absolutely transferred, unless the forms, required by the code, were observed in the contract. These forms, men of business, in their transactions, had neither time nor inclination to observe, and the consequence was, of necessity, a resort to some other legal mode, in which negotiable paper could be made available for the ordinary purposes of trade and exchange. Hence, for the purpose of raising money on a note, which was not to be transferred absolutely, it was sold with a privilege reserved by the owner to redeem it within a certain time.

These articles of the code, after having long been a most serious incumbrance to commerce, were, by common consent, repealed at the last session of the Legislature.

The transactions which give rise to this case, took place before the repeal of those articles, which are to regulate the rights of the respective parties, and the question is stated, whether the facts constitute a pledge or a sale of the draft of \$5000.

*Greenland* acted as the agent of *Partee & Co.*, and *Bell* as the agent of *Gray, Macmurdo & Co.* The testimony of both was taken at great length, and under a very scrutinizing cross-examination.

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*Greenland, a witness for Lowe and Pattison, gives this account of the business:*

"In the months of August and September, in the first instance, in August, on the part of *W. B. Partee & Co.*, having been appointed as the person to attend to their business, it became necessary from time to time to raise money; amongst other persons, application was made to *Messrs. Gray, Macmurdo & Co.*, and in the first transaction we had with them, we received an amount of money, I think, about \$7000, as near as my memory serves me; for this \$7000, we agreed to sell a certain amount of paper, reserving the right of repurchasing this paper at a stipulated price on a given day; several transactions of this kind took place between the middle of August and the middle of September; we had always repurchased the paper at the stated price, on or about the given day, except in two instances; in consequence of the embarrassment of the firm of *Partee & Co.*, it became impracticable to repurchase the paper, and that paper is now held, or was held, by *Messrs. Gray, Macmurdo & Co.*; there was no paper signed in the two last transactions with *Gray, Macmurdo & Co.*, and I believe, in those transactions, the paper sued on in this case was included; when I gave the draft of \$5000 in question, I think it was given to *Mr. Bell*; there was no written agreement made, and I do not, at this time, recollect any conversation in regard to it; the draft sued on, was given to *Gray, Macmurdo & Co.*, on the same terms and conditions that other paper had been given to them; that is, that *W. B. Partee & Co.*, had the privilege of repurchasing the same by a given day; the mode in which these negotiations were made was this: A certain amount was received from *Messrs. Gray, Macmurdo & Co.*, for which a certain amount of paper was transferred to them; they agreed that *W. B. Partee & Co.*, should have the privilege or right, on a given day, for the amount of money so received of *Gray, Macmurdo & Co.*, and a stipulated amount of commission and interests, of receiving back the paper so transferred. When this paper passed from my hands into those of *Mr. Bell*, there was a tacit understanding, as in former transactions, that *Partee & Co.* had the right of reclaiming the same; *Gray, Macmurdo & Co.* sent, after the stipulated time for paying the amount, to ask of *Partee & Co.*, if the money stipulated was to be paid. In the previous transactions which *W. B. Partee & Co.* had had with *Gray, Macmurdo & Co.*, a sale had been drawn and signed; it was, as I understood, a similar sale which *Gray, Macmurdo & Co.* desired should be signed; if the signature to that paper had been asked, at the time of making the loan, it would most unquestionably have been given; as near as my memory serves me, it was in the beginning of October, that a call was made on me for the signature of such a paper; it was perhaps ten days or two weeks after the time the money for the purchase was to have been returned, that the call was made on me for the signing of the paper; I did not sign the paper at the time the draft sued on was given to *Gray, Macmurdo & Co.* I received money from them, and the paper was to be returned in about five or seven days after, on the payment of the amount advanced, and with the commission and interest; when this paper, the draft sued on, was taken to *Gray, Macmurdo & Co.*, the understanding was either expressed or implied, that the paper was to be returned to *Partee & Co.*, in five or seven days, on the amount being repaid," &c.

On being examined by the defendants, he stated: "The first transaction between the parties, took place on the 28th of August, at which time \$7500 were received by *Partee & Co.* This sum was returned on the 1st of Septem-



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ber; there was a written condition of the sale of the paper, made to them; on the 2d September, there was the same kind of transaction made with them, and \$4500 received, and this was returned on the 6th September; on the 6th September, there was the same amount, \$4500, received of *Gray, Macmurdo & Co.*; that was returned on the 12th September; on the 8th September, there was another similar transaction, in which \$7500 was received, and returned on the 9th September; on the 10th September, there was another transaction of \$9000, which has never yet been returned; on the 15th September, there was a similar transaction, and \$8800 received, which was returned on the next day, the 16th September; on the 16th, there was another transaction of \$4000, which was returned on the 20th September; on the 18th September, there was another amount of \$6000, which has never yet been returned to *Gray, Macmurdo & Co.*; that for the two amounts of \$9000 and \$6000, above referred to, *Gray, Macmurdo & Co.*, had the paper which figures on the bilan of *Partee*. When the money was returned, the paper which had been placed in *Gray, Macmurdo & Co.*'s hands, was returned to *Partee & Co.*

The bills receivable, retained by *Gray, Macmurdo & Co.*, on the two advances of \$9000 and \$6000, are the following," &c.

*William Bell*, a witness for the plaintiffs, makes this statement: "I heard *Mr. Greenland* give his testimony in this case." Being shown the bill sued on, says: "It belongs to *Gray, Macmurdo & Co.*; I bought the same for them sometime in September last, from *Mr. Greenland*; I had several transactions with *Greenland*, wherein I bought certain paper from him, with the understanding, that he was to redeem them within a given time, from five to seven days; but, in no case, to exceed seven days; in two of those transactions, *Greenland* failed to redeem the paper; this note sued on was in one of those purchases; the note in question was purchased by myself; I attend to the business of *Gray, Macmurdo & Co.*, generally, and hold their power of attorney; none of the members of said firm were present at said transaction, and I think none of them were in town; I am not certain but that *Macmurdo* was in town; but my impression is, that none of them were; when this paper was purchased, there was a time fixed within which it was to be redeemed; I cannot say the precise number of days which were fixed, within which this paper was to be redeemed, because the mode of fixing the day was not by the number of days, but by fixing a day in the week, or a day in the next succeeding week; the mode fixed by *Greenland* was on such a day of the week, or the next succeeding week; in no instance did the time fixed exceed one week; in this case, I am confident, that the time fixed did not exceed one week; *Mr. Greenland* did not offer to redeem this paper within the time, or tender the money.

Being shown the description of the bills in the petition of *Lowe and Pattison v. Partee & Co. et al.*, and asked whether they are the bills which were acquired by *Gray, Macmurdo & Co.*, in the same manner as the one sued on, says "they were; cannot say, that they were acquired at the same time as the one sued on; but they were acquired at one of the two times alluded to, and in the same manner; about the day, or two days after the time fixed for the redemption of this paper, I think on the 24th or 25th of September, I called on *Mr. Greenland*, and told him, that I did not want the paper; that if he, *Greenland*, would give me \$15,375, that he might have the paper back. *Mr. Greenland's* reply was, that he knew he had no right to the paper, that he felt aware,

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that it was a fever which I was rendering him, but that if he could get the money that day, he would redeem the paper.

"Mr. *Greenland* never did give me the \$15,375. As far as I had any knowledge, Mr. *Greenland* generally did all the business and financial transactions of *W. B. Partee & Co.*, and even when *Partee* was here, *Greenland* came to borrow money of *Gray, Macmurdo & Co.*; I do not know that *Greenland* got any money when *Partee* was here.

"After Mr. *Partee* returned from the north, he never made any objection, to my knowledge, to plaintiffs, *Gray, Macmurdo, & Co.*, to hold the paper, or to *Greenland's* authority to transfer it to them; I am still doing business for *Gray, Macmurdo & Co.*; from my position in their house, had *Gray, Macmurdo & Co.*, made any such objections, I think it very likely that I should have heard of it; I did not understand the transaction to be a loan, with the paper left as collateral security; I would not have made a loan on a pledge of the paper as collateral security; on the first transaction with *Greenland*, Mr. *Macmurdo* consulted me about the matter, and I told him, that a loan on pledge of paper would not be legal, and that he must have a sale of the paper; I drew up the original sale of the paper on said first transaction, and I acted on all subsequent transactions, with *Greenland*, on the same footing as the first transaction; on the two transactions, in which the paper was not redeemed, I gave, on one occasion, \$9000, and on the other, \$6000, and the amount of paper received was something over \$20,000."

Cross-examined. "I had a general power from *Gray, Macmurdo & Co.*, for all intents and purposes; it was written; I had no special power; the members of the firm, are Mr. *Gray* and Mr. *Macmurdo*, and no one else; when I got this draft sued on, I cannot say what other paper I got with it, but I can tell what paper we got for the two transactions together."

Being shown the schedule of *Partee & Co.*, says: "The paper put down on the schedule of *Partee & Co.*, as being in the hands of *Gray, Macmurdo & Co.*, is the paper which *Gray, Macmurdo & Co.*, held under the two transactions spoken of; the dates of the maturity of the paper, I believe, to be correctly stated; of said papers, there has been actually paid \$3376 75; two of the papers have been sold, to wit, that belonging to the church, of \$1038 83, and \$1080 64; the rest of the paper they still hold; I am unable to say what I did give for this \$5000 draft; I cannot distinguish what particular paper I received at the two particular transactions; when I called on *Greenland* and told him he could have the paper by paying \$15,375, *Partee* had not returned to the city; cannot say if, at that time, it was generally known here, that *Partee* had failed; that fact became generally known here, sometime in the latter part of September; *Gray, Macmurdo & Co.* never lent *Partee* money since I have been there; I know that they refused to lend money; there was no broker employed in this transaction; on these transactions, the charge was generally one per cent commission; in case the money was returned, it was understood, that *Greenland* had to pay one per cent commission in addition to the amount obtained; Messrs. *Gray, Macmurdo & Co.*, never censured me for taking this paper in any way. The objection which I had to lending money on a pledge, was because it required an act to be made before a notary; this was the reason why I took a verbal sale of the paper in the last transactions; I would have taken a written sale, but stopped, at *Greenland's* solicitation, that he was in a hurry for the money."

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Re-examined. "I have been in business with *Gray, Macmurdo & Co.*, since the 19th May last; the consequence was, that if the paper was not redeemed within the time fixed, the paper belonged to *Gray, Macmurdo & Co.*; such was the understanding. *S. B. Conrey* has failed."

*William Bell*, re-called by plaintiffs, *Gray, Macmurdo & Co.*, says: "*Messrs. Lowe, Pattison & Co.*, have failed; that is, they have suspended payment; I received the paper in this transaction, and am acquainted with its character; I consider, that *Gray, Macmurdo & Co.*, gave a fair price for said paper, and the reason why I think the price a fair one, was because, when I tried to get the paper off, I could not get for it, what *Gray, Macmurdo & Co.* gave for it; I offered the greater part of the paper for sale, in the latter part of September; about the 26th of said month, I offered *Lowe and Pattison's* and *John Williams'* paper then." The evidence given by the witness on the 20th inst., being read to him, he desires to correct that portion of it which says: "the objection which I had to lending money on a pledge, was because it required an act to be made before a notary; this was the reason why I took a verbal sale of the paper, in the last transaction, by stating, that the two alternatives of a loan or pledge, were not presented to me; the only offer made to me was a sale; if the other alternative of a loan or pledge had been offered, I would have refused."

The district judge was of opinion, that the testimony of these witnesses established the fact of two sales of notes, of which the price of one was \$9000, and of the other, \$6000; that a day for the redemption was fixed by each of the contracts; that the delay expired without the bills having been redeemed. But he was not satisfied that, under the evidence, the legality of the sale of the draft could be sustained. His reasons are thus given at length:

"But here commences the difficulty. The sale of the 10th of September, became irrevocable on the 15th, or, at the farthest, on the 17th of September, according to both the witnesses; consequently, before the contract of the 18th was made, that of the 10th was consummated, by the default of the seller, to the advantage of the purchaser. It follows, that the bills which constituted the object of the first *vente à réméré* on the 10th of September, could not possibly constitute the object of the second *vente à réméré* on the 18th of September, because *Partee & Co.* could not possibly sell to *Gray, Macmardo & Co.*, that which already belonged, by an absolute title, to *Gray, Macmurdo & Co.*

"Now, both the witnesses, *Greenland* and *Bell*, declare, that the list of notes and accepted drafts given in evidence, as put down among the assets of *W. B. Partee & Co.* upon their schedule, and amounting to a nominal value of twenty thousand dollars and upwards, is a correct list of notes and drafts transferred to *Gray, Macmurdo & Co.* by *Partee & Co.*, by the two contracts of the 10th and 18th of September; but both these witnesses are unable to specify which of the said notes and drafts were delivered to *Gray, Macmurdo & Co.*, on the 10th, and which on the 18th September. In other words, these witnesses have failed to specify what was the thing sold on the 10th of September, and what was the thing sold on the 18th of September. They agree in declaring that the draft now sued upon, was included in one or the other of those transactions or contracts, but they are unable to say, which. But, for the reason already stated, it is impossible that this draft was included in both of the contracts, considering those contracts as sales with the clause of redemption.

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"The price of the first of the sales in question was \$9000; that of the second was \$6000.

"The evidence leaves it entirely uncertain to which of those sales the draft now in suit belongs. We have, therefore, no proof what price was given for it, or for any of the bills receivable contained in the list above mentioned.

"I am fully impressed with the truth of the argument used by the counsel of *Gray, Macmurdo & Co.*, that a sale of a flock of one hundred sheep for one hundred dollars, is good, without any specification of how much is given for every particular ram, wether and ewe in the flock. But, at least, the flock must be susceptible of identification; unless so, I must say, that such a sale could not be carried into effect, and would be, to all practical purposes, void. In like manner, *Lowe and Pattison's* acceptance for \$5000 belonged to a batch of bills receivable, sold by *Partee & Co. to Gray, Macmurdo & Co.*, on the 10th of September, for \$9000, or it belonged to another batch, sold by the same vendors, to the same vendees, on the 18th September, for \$6000. But, the agents of the vendors and of the vendees, in making the two sales, are alike unable to identify the paper sold at either sale; and, consequently, to identify whether this draft was included in the first or last sale. It appears to me a confusion of ideas, to blend the two contracts, and to say that, because the whole price of the two sales was \$15,000, and because all the bills and notes on *Partee's* schedule are embraced in these two sales, that therefore the title of *Gray, Macmurdo & Co.* to each and every bill and note in that schedule is made out. To elucidate my idea: suppose that *Partee & Co.* had presented themselves, on the 20th of September, to *Gray, Macmurdo & Co.* with \$6000, (and one per cent added,) in hand, demanding the return of his acceptance of *Lowe and Pattison*, as returnable under the contract of the 18th of September. And suppose, upon such a demand, that *Gray, Macmurdo & Co.* had refused to re-deliver the said acceptance, on the ground that it was absolutely their property, under the contract of the 10th of September. Who can say, under the evidence, which would have been right? The fact is, that the two contracts were so distinct, that one was consummated before the negotiation for the other was commenced.

"I decide, for the foregoing reasons, that *Gray, Macmurdo & Co.* have failed to establish their title to the accepted draft sued upon, by failing to identify the contract by which the draft was transferred to them by *W. B. Partee & Co.*

The transactions of the 10th and 18th of September, being conceded by the learned judge to be sales, and valid transfers of the things sold, in each case, does it follow, because the witnesses cannot swear as to which of the batches or parcels this draft was included in, that, therefore, it can be sustained as a legal inference, that the object of either was uncertain? As the witnesses concur in stating the draft to have been included in one or the other of the sales, the conclusion is excluded, that it was included in both. We understand the testimony as establishing the verity of each transaction at the dates of the 10th and the 18th, as distinct and separate from the other; and that the price of one was sale \$9000, and the other, \$6000. As to which of these sales the draft formed a part of the objects, the recollection of the witnesses is at fault; but that it formed a part of one or the other, that it was bought on one or the other of those days, the testimony appears positive.

Had *Partee & Co.*, as in the case supposed by the learned judge, presented themselves, and offered to redeem this draft, within the time of redemption, and demanded the redemption, under the contract of the 18th of September, and

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*Gray, Macmurdo & Co.* had insisted on retaining it, under the contract of the 10th of September, and, had the witnesses to the transaction testified as they do now, it is true, that the embarrassment in ascertaining by which of the contracts the draft was sold, would arise. But our impression is, that we are not justified by the evidence in assuming that such a state of things could have occurred.

As the draft was included in one or the other of the parcels, the matter being fresh in the minds of those who had been occupied about it, it is hardly probable that the parties could not have known exactly how it occurred; and even if the fact was left doubtful, as to which of the parcels the draft belonged, the sale of it would not be invalidated, when it was certain that it was included in one or the other of the parcels. The seller would be embarrassed in exercising his right of redemption, from the slovenly manner in which he did his business; but the right to hold the objects sold, would not be affected by this irregularity.

Ambiguous or obscure clauses in the contract of sale, are interpreted against the seller, who is bound to explain himself clearly as to the extent of his obligations. Code 2449.

This rule may not be strictly applicable to the present case; but, when we look at the haste which attended those transactions, the irregular mode in which the business was done, the condition of *Partee's* house, which was already seriously embarrassed on the 18th, if we cannot fix illegality upon the transaction, we must recognize it as valid, or defeat all contracts made by such people, who do their business irregularly and under such circumstances. When notes have been fairly sold, in parcels or batches, at two different times, and the price paid for them, it would certainly not be just that the sale of all should be defeated, by the vendor's not being able to establish his right of redemption to any particular object.

We, therefore, are not able to concur in the conclusion of the district judge, that the plaintiffs have not made out their right to the draft in question, by reason of their failing to identify by which of the contracts they acquired it. It being conceded, that they acquired it by one or another contract, this uncertainty in the testimony, we do not conceive defeats their title.

The plaintiffs' case being relieved from this objection, we have before us the sale of a draft, with the privilege reserved to the seller to redeem it within a certain time, and a failure to redeem it. It was purchased at a fair market price, and the plaintiffs gained no undue advantage by their bargain.

The principal argument of the counsel for the plaintiffs is, to show that a loan of money was contemplated by the parties, and that these transactions, taken together, amount to nothing more than the giving the notes as collateral security for the payment of the loan.

The object of *Partee & Co.* unquestionably was, to raise money by the notes which they delivered to the plaintiffs; but the evidence, we think, is conclusive, that they were not pledged, but sold, with a privilege of redemption; and that the property in them passed to the purchaser, and would revert in the seller on their redemption. The contract of pledge was known to both parties as unavailable for their urgent purposes; and the contract of sale was, that which alone would give the plaintiffs the equivalent which they asked for the advance of their money, and which *Partee & Co.* had agreed to provide, as they had provided in other similar cases.

An inference from the testimony of the witnesses is attempted to be deduced, that the books of *Gray, Macmurdo & Co.* contain no entry of this draft among

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their bills receivable, nor of the price or consideration given for it. The books of the plaintiffs would not have been admissible as evidence for them. If the defendants wanted to use them, they ought to have asked for their production, and sought to establish by certainty, what is now a matter left to conjecture. The witness *Bell*, had he been interrogated on this subject, could have stated the fact thus inferred, and would have had an opportunity of giving explanations in reference to it. It would not be just to suffer an inference of this kind to weaken the validity of clearly established rights.

Upon the whole, we consider the defence quite untenable. If maintained, it would establish a precedent which would operate a check upon a free and fair circulation of negotiable paper, and be an innovation of the law as well as of the usages of trade in that article.

The judgment must be reversed.

It is therefore ordered, adjudged and decreed, that the judgment of the court below, in these two cases, be reversed, and that the defendants, *Bartley M. Lowe* and *William H. Pattison*, composing the firm of *Lowe and Pattison*, and *Alexander Pattison*, be condemned, *in solido*, to pay the plaintiffs, *Gray, Macmurdo & Co.*, the sum of five thousand two hundred and fifty-four dollars, being the amount of the protested draft, with damages at five per cent, and costs of protest, with interest at the rate of five per cent, from the 14th day of November, 1851, till paid. It is further ordered and decreed, that there be judgment against the firm of *Lowe and Pattison*, and the firm of *Lowe, Pattison & Co.*, in their suit for injunction, and the injunction granted therein is hereby dissolved. It is further ordered and decreed, that the said *Gray, Macmurdo & Co.* are the lawful owners of the said paper, the negotiation of which was enjoined by the said *Lowe and Pattison*, and *Lowe, Pattison & Co.*, and that judgment be rendered thereon in favor of said *Gray, Macmurdo & Co.* And it is further ordered and decreed, that there be judgment against *W. B. Partee*, on his intervention as syndic of the creditors of *W. B. Partee & Co.*, and that the same be dismissed, at his costs, and that all the other costs of these suits be paid by the said *Lowe and Pattison*, and *Lowe, Pattison & Co.*

Application for a re-hearing refused.

#### SUCCESSION OF JOHN McDONOGH.

C. ROSELIUS, F. B. D. AQUIN, A. D. CROSSMAN AND W. R. LEITCH v. R. R. GURLEY, B. C. HOWARD AND B. MAYER.—No. 2416.

T. J. DURANT, Attorney of Absent Heirs of J. McDonogh v. R. R. GURLEY, B. C. HOWARD AND B. MAYER.—No. 2456.

A testamentary executor, present in the State, but domiciliated out of it, cannot obtain letters of administration without executing his bond with good and solvent security, for such sum and under such conditions as are required by law from dative testamentary executor.

**A**PPEAL from the Fifth District Court of New Orleans. *Buchanan J. M. Grivot* and *Levi Pierce*, for plaintiff. *H. H. Strawbridge, Miles Taylor* and *J. A. Maybin*, for defendants. By the court: (*Slidell, J.*, absent.)

EUSTIS, C. J. No. 2416.—By the will of the late *John McDonogh*, seventeen persons were named executors, of whom eight resided in New Orleans, and six resided in Baltimore, and three elsewhere.

Four of the residents of New Orleans were qualified as executors, received their letters testamentary, and took upon themselves the performance of their trust. Five of the non-residents, viz : *Messrs. Gurley, Howard, Mayer, Gibson and Smith*, were also qualified as executors, received their letters, and entered upon the performance of their duties.

This appointment has given rise to several appeals, from decrees rendered by the Court of the Fifth District of New Orleans. The questions involved in each case, though dependent, it will be necessary to examine separately, leaving out of view all matters not necessarily connected with them.

An appeal is taken by the New Orleans executors of the succession of *John McDonogh*, from two decrees, by which *R. R. Gurley, Benjamin C. Howard and Brantz Mayer*, were admitted to be qualified as executors of said succession, and letters testamentary were directed to be given to them, without their being required to give security.

The third section of the Act of 1842, amending the article 924 of the Code of Practice, and for other purposes, provides, "that whenever the testamentary executor named in the will, shall be present in the State, but be domiciled out of it, the judge shall only grant him the letters on the execution of his bond, with a good and solvent security, for such a sum, and under such conditions as are required by law from dative testamentary executors." Acts of 1842, 302.

This law is plain, free from doubt, and imperative. The residence of the gentlemen is alleged, in their petitions, to be in Baltimore, and those appointments, without being required to give security, cannot be maintained. The decrees appealed from, must therefore be reversed; the appointment of *Messrs. R. R. Gurley, B. C. Howard and Brantz Mayer*, as executors, vacated; the appellees to pay the costs of the appeal.

By the court :

*EUSTIS, C. J.* No. 2456.—On the 1st December, 1851, a judgment was rendered, by which the letters of testamentary executorship, heretofore granted to *R. R. Gurley, Benjamin C. Howard and Brantz Mayer*, of the city of Baltimore, in the succession of *John McDonogh*, were revoked. This judgment was rendered on the application and petition of *Thomas J. Durant, Esq.*, attorney, appointed by the court to represent the absent heirs of the deceased. *Messrs. Gurley, Howard and Mayer*, have appealed from this judgment.

The residence of *Mr. Gurley*, was in the district of Columbia, and that of *Messrs. Howard and Mayer*, in Baltimore. These gentlemen, as we have seen, were appointed executors by the will, and were admitted to be qualified, under decrees, of date the 11th and 13th of December, 1850. The effects of the succession having been subjected to process of sequestration, at the instance of the State, these gentlemen, who had come to New Orleans for the purpose of attending to their duties as executors, returned to their homes a few days after, and have not since come back to Louisiana.

On departing from the State, they left no power of attorney to represent them in the administration, as required by the Act of 1849, and for this reason, the district judge revoked their letters testamentary.

The decision which we have rendered, concerning the validity of the decrees, by virtue of which the appellees claim to act as executors, renders the decision in this appeal unnecessary. It falls with that decision.

SUCCESSION OF PRESTON, J., dissenting.\* *John McDonogh*, a resident of Louisiana, leaving a large estate, appointed, by his will, executors residing in and out of the State of Louisiana. Four of those appointed in the State, were qualified, and four of those residing without the State.

Questions are presented in relation to the respective rights of these executors, which, I think, might be postponed until the decision of the main case now before the court. But as the decisions are pressed, I will give my conclusions, without going at length into the reasons until the main questions, with regard to the will, are decided.

The whole estate of *McDonogh* appears, to me, to be so much involved in controversies, that, as at present advised, I am of opinion, that commissions on the whole property, will be but a just and reasonable compensation for his numerous executors. They should be paid only as the estate is passed over to his creditors, legatees or heirs. I should infer this from article 1676 of the code, and 1067 of the Code of Practice; but when I compare article 1663, with 1182 of the code, the inference is irresistible.

In making the estimate of the amount of the commissions, property, which is of no value, is to be deducted. That is the meaning of the term productive, in the article 1676 of the code allowing commissions.

I do not believe *McDonogh* intended to make any distinction between his executors, as to their powers. He made the cities of Baltimore and New Orleans, his universal legatees. Considering the whole of his will, it appears to me, he intended that the foreign executors should see his whole will carried into effect, but guard especially the interests of the city of Baltimore, and of the colonization society; and that his executors in this State, should guard especially the interest of New Orleans, and some of her charitable institutions.

This object would probably fail of its accomplishment, if the foreign executors were required to give security like dative executors. He, therefore, never intended it. Does the 3d section of the act of the 16th of March, 1842, imperatively require it?

It is an act providing "for the administration of the successions of strangers dying, possessed of property, within the State of Louisiana, and for other purposes." The object of the act, as expressed in the title, does not necessarily embrace the estate or executors of *McDonogh*, who was not a stranger, but an ancient citizen of this State. I do not think the spirit of the act applicable to this case. The object of the act, was to prevent a foreign executor representing the whole estate, from carrying off the whole property, without accounting to our courts. That is impossible, where there are resident as well as non-resident executors, and joint resident and non-resident legatees of the whole estate, entitled to claim its immediate seizin by their commissioners. Indeed, it appears, that by a writ of sequestration on behalf of the States of Maryland and Louisiana, the great mass of the succession is tied up so, that, apparently, it is not in the hands of the executors. So that the security for the faithful administration of the foreign executors, would, under all the circumstances, be but nominal. Code 1034. I do not think, therefore, that the appointment of the foreign executors, should be vacated on account of not having furnished it. Much less should their appointment be vacated for having returned to their homes, without leaving powers of attorney. Their

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\*The dissenting opinion of Judge *Preston*, expressed his views of these cases, and also of the following case on the opposition of *Howard, Gurley and Mayer*, to the account of the executors of *John McDonogh*. By agreement of counsel, these suits were consolidated.



co-executors, in such case, act for them, for whose acts they are responsible. SUCCESSION OF  
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Code, art. 1674. The article of the code 1149, and the act of 1849, relied upon for revoking their appointment, on account of absence, refers to cases where their absence leaves the estate unrepresented. No such thing existed in this case. To be a cause for dismissing them, it must also appear, that the succession suffered loss by their absence. Nothing of the kind is pretended. They were strangers, not advised, so far as appears, of these local laws which probably exist no where else. They complied with them, as soon as advised of the necessity. I do not see in the records, the least disposition, on their part, to neglect their duty, disregard our laws, or not to pay the most implicit obedience to our courts. In all respects, I think, they stand upon the same footing with the domestic executors, and have, with them, a great and difficult duty to perform, to execute a somewhat anomalous will in this State, disposing of a very large estate for purposes of great public utility, the execution of which, will require the united exertions and wisdom of all the executors; and for which, probably, commissions on the whole estate, will not be more than an adequate compensation.

### SUCCESSION OF JOHN McDONOUGH,

On the Opposition of R. R. GURLEY, B. C. HOWARD and B. MAYER,  
to the Account of the Executors—No. 2524.

The code provides, that if the executor has not a general seizin, his commission shall be only the estimated value of the objects which he has had in his possession, and on the sums put into his hands for the purpose of paying the legacies and other charges of the will. Art. 1677. Yet, where the seizin of the property of the succession was not given by the will, but the executors took possession thereof in the absence of the heirs, and the possession was legal and beneficial to the heirs, it was held, that they were entitled to commissions under the article already cited.

An executor cannot claim a commission on waste, uncultivated lands; nor can commissions be charged on bad debts, that is, those which are prescribed or due from insolvents.

**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. H. H. Strawbridge*, for the opponents. *Levi Pierce* and *M. Grivot*, for the executors. *Thomas J. Durant*, for the absent heirs. By the court:

EUSTIS, C. J. An appeal was taken by the New Orleans executors, from a judgment of the court, by which an opposition to a tableau of distribution, filed by the former, on the part of *R. R. Gurley, B. C. Howard* and *B. Mayer*, of Baltimore, was sustained, and each of them allowed one-eighth part of the total sum charged, as commissions of executors, on the tableau. This judgment was rendered on the 23d of January, 1852.

The question involved in this appeal, relates to the commissions claimed in this opposition.

By the will, the seizin of the immovable property of the deceased was not given to the executors; on the contrary, it is given to commissioners to be appointed under the will. Seizin is given to the executors of the personal property only.

The code provides, that if the executor has not a general seizin, his commission shall be only the estimated value of the objects which he has had in his

**SUCCESSION OF McDONOUGH** possession, and on the sums put into his hands for the purpose of paying the legacies and other charges of the will. Art. 1677.

Under the will, it is clear that the commissions of the executors were to be confined to the personal property which came into their possession, and such was the settled purpose of the testator.

Under a state of things which were not foreseen, and consequently not provided for, the executors found themselves temporarily in possession of all the property of the succession, subject to the process of sequestration before noted on this property, amounting to some two millions and one half of dollars, according to various inventories, the executors have charged a commission of two and one-half per cent, amounting to the sum of \$62,348 70. The district judge thought the three executors, who are the appellees in this appeal, were entitled to their share in these commissions, and decreed accordingly.

In this connection, we deem it our duty to state what we conceive to be the law on this subject of commissions.

In the case of *Anderson's Heirs v. Anderson's Executors*, 10 L. R. 35, the court held, in a case where the seizin of the property of the succession was not given by the will, but the executors took possession thereof in the absence of the heirs, and the possession was legal and beneficial to the heirs, they were entitled to commissions under the article 1677 of the code. But an executor cannot claim a commission on the value of waste, uncultivated lands. *Succession of Milne*, 5 R. R. 48. Such property is considered as forming no part of the productive property of the succession. Nor can commissions be charged on the amounts of bad debts, that is, those which are prescribed or due from insolvents. Code, 1676. By this article, the executor, for his care and trouble, is allowed to charge 2½ per cent commission on the whole amount of the estimate of the inventory, deducting that of property which is not productive, and bad debts.

There are cases in which commissions are allowed to executors on the estimated value of unproductive property, where the administration of it gives trouble and requires expense, as where it is in litigation, or works are required in order to preserve it. *Succession of Girard*, 4 Ann. 386. The cases on this subject, are collected and reported with great accuracy and ability in the digest of Mr. Hennen, *verbo* Succession xi, (h.)

Under this view of the law, the charge of two and one-half per cent on the whole amount of the estimated value of the property of the succession, made by the executors, cannot be sustained. A large portion of this immense estate is not productive, consisting of uncultivated lands, and not subject to a general charge of commissions for the executors.

As the journey of these gentlemen, from their homes to this city, must probably have been attended with inconvenience, and certainly with considerable expense; and, as it was undertaken in the furtherance of the objects of the testator's will, the parties in interest will doubtless not be insensible to their claims; but the questions which we have been obliged to act upon, are exclusively of law, and must exclusively be governed by it.

Our opinion is, that the appellees have no legal claim on the effects of the succession, by reason of the express provision of the act of 1842, before noted. For the reasons given, this court can enter no decree sanctioning the allowance of the commission of two and one-half per cent to the New Orleans executors. The only portion of this charge before us is, that included in the adverse claim of the appellees, and to this portion the effect of our judgment is necessarily

confined. The decree of the district court, homologating the executors' account, except as opposed, in which this charge is made, has not been appealed from. Our judgment is upon the opposition of the appellees, which the decree of the district court sustained.

It is therefore decreed, that the judgment appealed from be reversed; the opposition of the appellees be dismissed, and the case remanded for further proceedings; the appellees paying costs in both courts.

Rost, J., concurred. PRESTON, J., dissented.\*

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L. T. CHALON v. AUGUSTUS W. WALKER. E. CHALON et al.,  
Intervenors.

Defendants purchased property at a sale made to effect a partition, and alleging that there were informalities in the action of partition under which the sale was made, refused to pay the price, and claimed its rescission. The parties interested in the partition, offered to waive the informalities, and, within a reasonable time to be allowed by the court, to ratify the sale. *Held*: The parties in interest could alone object, and it was competent for them to waive the informalities. *Held, also*: That under the authority vested in the court, by article 2042 of the code, leave can be granted to them to waive the errors and ratify the sale within a reasonable time.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Buisson, Benjamin, and L. Janin*, for plaintiffs. *Elmore and King*, for defendant. By the court: (*Preston, J.*, dissenting. *Slidell, J.*, absent.)

Rost, J. The plaintiff claims from the defendant the price of certain lands purchased by him at public auction, with the interest that has accrued upon it.

The answer of the defendant is not so explicit as might be desired; but we understand the prayer to be for a resolution of the sale, on the ground of informalities in the action of partition under which it was made. There was judgment against him for the amount claimed and interest, and he has appealed.

In the action of partition, *Elizabeth and Palmyre Alpuente*, two of the parties, were married women. The answer states, that they were duly authorized and assisted by their husbands. But the husbands did not make themselves parties to the proceeding, and no authorization is shown.

The heirs of *Rabassa* were parties in interest, and should have been made parties to the suit. His executor alone was cited.

No experts were appointed to determine whether the property was susceptible of division in kind.

These are informalities of which the parties having an interest could alone take advantage, and which it is in their power to waive, by ratifying the sale; and, as they have offered to do so, within any reasonable time the court may allow, we consider this a proper case for the exercise of the discretion vested in us by article 2042 of the Code.

It is therefore ordered and decreed, that in conformity with article 2042 of the Civil Code, *Elizabeth Alpuente*, the wife of *Alexander Joseph Atocha*, by him duly authorized and assisted; and *Palmyre Alpuente*, the wife of *Henry Boyle*, duly assisted and authorized; *Julie Pamela Mary*, the wife of *Antoine Joseph Guirot*, by him duly assisted and authorized; and the heirs of the late *Joseph Rabassa*, have a delay of sixty days, to ratify and confirm the adjudication made to the

\*See the dissenting opinion of *Preston, J.*, last case.

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defendant, *Augustus W. Walker*, of the property described in the petition: and, whereas the defendant alleges that there are various irregularities in the proceedings for a partition, under which the adjudication to the defendant was made, and the plaintiffs have declared their willingness to ratify generally the said proceedings and adjudication, whereby, it becomes unnecessary to examine said irregularities, it is further ordered, that the plaintiffs and their assigns do ratify said proceedings for a partition, and said adjudication, within said delay of sixty days; that, on the plaintiffs executing before a notary public, and filing in the Fifth District Court, within said delay, a copy of the act of ratification, as hereabove directed, they recover from the defendant, the sum of two thousand six hundred and sixty-four dollars, with five per cent interest on the sum of \$666, from the 5th of December, 1250; and with interest at the rate of eight per cent on the further sum of \$666, from the 11th March, 1850; on the further sum of \$666, from the 11th of September, 1850; and on the further sum of \$666, from the 11th March, 1851—until final payment, with costs in the court below; the costs of the appeal to be borne by the plaintiff. And it is further ordered, that if the plaintiffs should fail to execute and file, within the aforesaid delay, said act of ratification, as within directed, the aforesaid adjudication, made to the defendant on the 8th March, 1849, be annulled and rescinded, and that in that case the plaintiffs pay the costs in both courts. It is further ordered, that this case be remanded to the district court, for the purpose of having the foregoing decree carried into effect.

EUSTIS, C. J., concurred with ROST, J.

PRESTON, J., dissenting. In a suit of *Joseph Chalon et al. v. Chalon et al.*, for a partition, which was decreed, the sheriff of the parish of Orleans, after the notices required by law, and in obedience to the judgment of the court, on the 5th and 8th of March, 1849, offered for sale a large number of lots, in the rear of the city of New Orleans, the price to be paid one-fourth cash, and the balance on twelve, eighteen and twenty-four months' credit, the notes secured by mortgage, and bearing eight per cent interest from maturity until paid. The defendant became the purchaser, for the aggregate amount of two thousand six hundred and sixty-four dollars. A title having been made out and tendered to him, he refused to accept it and comply with the terms of sale. This suit is brought to recover the price, according to the terms.

The defendant excepts to the suit, that the heirs of *Joseph Chalon*, and the numerous other parties interested in the partition, have alone the right to maintain this suit against him, upon the grounds set forth in the petition; and his administrator has no such right. Thereupon, all the parties interested intervened, and insisted upon the allegations and prayer of the original petition, and thus disposed of the exception.

The defendant, answering to the merits, alleged, that the various judicial proceedings carried on in the suit of *Chalon et al. v. Chalon et al.*, for a partition, in which the property was sold, were conducted with so much irregularity and illegality, that they have no binding effect upon the parties thereto, many of whom are minors, and others married women, who at any time could claim the property sold to effect the partition, so that the title tendered to him is so defective that he is not bound to pay his money for the property. He assigns several special reasons:

1. That *Joseph Chalon*, the plaintiff in the suit for partition, was a member of a family meeting called on behalf of the minor, *H. H. Alpuente*, one of the parties to the suit, and one of the defendants. The conclusive answer of the

plaintiffs to this objection is, that the only question submitted to the family meeting was, on what terms the property should be sold; *Chalon* and the minor were equally interested, that the property should sell for a good price, and therefore that judicious terms of sale should be recommended. It is an interest adverse to that of the minor, which incapacitates a relative from serving as a member of a meeting of his family, not a concurrent interest with him.

2. It is objected, that the answers to the suit for partition, by several of the heirs, who were married women, and were defendants, are authorized by their husbands. The record shows that, the answer was signed by a licensed attorney, who represented them, as authorized to answer by their husbands, who assisted them in the suit. The authority of the attorney to file this answer, has not been disavowed by the husbands, or denied upon oath by the defendant. On the contrary, the authority of the husband has been since ratified by their appearing, with their wives, and receiving the proportion due to their wives of the proceeds of sales that have been collected, and also joining their wives in this suit, to compel a compliance, on the part of the defendant, with the terms of sale.

3. It is objected, that *Etienne Chalon*, testamentary executor of *Joseph Rabassa*, was made party to the suit, instead of the heirs of *Rabassa*.

The action for a partition, is undoubtedly a real action, and the heirs of *Rabassa* should have been made parties to the suit, as specially decreed by the Civil Code and Code of Practice. C. P. 123. C. C. 1230, 1245.

But there is not a suggestion, much less proof, in the record, that the property sold for less than its value; and the executor of *Rabassa* has received his share of the proceeds of the sales which have been completed, and intervened in this suit to approve the former proceedings, and claim his share of the proceeds of these lots. There are also other lots bought by the defendant, at the same sale, for which suit is not yet brought to prove a compliance with its terms. In forcing a compliance with the sale of those lots, I would recommend a mere ratification of the whole proceedings, on behalf of the heirs of *Joseph Rabassa*, but do not see sufficient danger of eviction or loss, to the defendant, which may not be avoided, to afford him relief in this case.

Another objection, made by the defendant, to this title is, that no experts were appointed to report to the court whether the property should be divided in kind, or sold to effect the partition. It was proved to the satisfaction of the district court, and appears conclusively to me, that the partition could only be made by a sale, and that the property could not be divided in kind. This superseded the necessity of experts. Other smaller objections are made, but they appear to me quite immaterial to the title.

I think the judgment of the district court should be affirmed, with costs.

### THEODORE SHUTE, Executor, v. W. W. DODGE et al.

The captain of the steamer *Concordia*, who is part owner, had an insurance in an office, of which *Snethen* was the agent. The boat was sunk; the captain abandoned, and *Snethen* refused to accept the abandonment. The captain then made a contract with *Snethen*, as the agent of a bell boat, to "save the cargo and other property from the wreck, in con-

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allocation of the salvage hereafter to be agreed upon, by certain named arbitrators, and the free and full possession of the wreck." The bell boat raised the steamer and brought it to New Orleans, where it was sold by the port wardens. The owner of the bell boat bought it, and had it repaired. *Held*: The sale, by the port wardens, was illegal, and the purchaser acquired no rights by the purchase.

The circumstance, that the owner of the bell boat raised the steamer, by means of his boat, gave him no right to possession of the steamer.

The stipulation in the contract, that the captain of the bell boat should have "free and full possession of the wreck," meant nothing more than a possession or holding for the purpose of saving the cargo and property, and the exclusion of all interference with his wreck; but not a possession adversely to the owners.

The purchaser had no right to have the steamer repaired at the expense of the owners, and they are only responsible for those repairs, to the extent that they are benefitted.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Benjamin and Micou, and Bonford and Finney*, for plaintiff. *Ogden and Duncan*, for the defendants. By the court: (*Slidell, J.*, absent.)

**EURIS, C. J.** The questions upon which this case has been made ultimately to turn, relate to certain claims set up by the defendant, *Dodge*, on the proceeds of the sale of the steamer *Concordia*. The learned judge of the district court describes the case as troublesome and intricate beyond any one which has ever passed through his hands. In deciding it, we must endeavor to simplify it as much as possible; every thing which has not a serious bearing upon the result, must be kept out of view.

This appeal is taken by the defendant, and the plaintiff asks a change in the judgment in his favor.

The plaintiff represents the owners of two-thirds of the steamer *Concordia*, of this port; her captain, *S. B. Frost*, owned the other third. She was snagged a short distance above Fort Adams, on Sunday the 17th of October, 1850.

*Frost* was insured for five thousand dollars, with the *Columbian Insurance Company*, of which *Mr. Sneathen* was the agent, and abandoned as for a total loss; the abandonment was not accepted.

The cargo of the steamer was very valuable, and the captain made a contract with *Sneathen*, as the agent of a bell boat, to save the cargo and other property from the wreck, in consideration of the salvage hereafter to be agreed upon by certain named arbitrators, and the free and full possession of the wreck.

Not only the cargo was saved, but the boat was raised and brought to New Orleans, on the 16th of November. She was sold by the port wardens, and bought by *Dodge*, the owner of the bell boat. She was then put into *Salter and Marcy's* dock, for repairs, was sequestered in this suit, and, after the first judgment rendered in the suit, was sold under the agreement of all concerned, and produced the sum of \$8000, which is now before us for adjudication.

The plaintiff, at the time of the accident, was building a new boat at New Albany, and under date of the 31st October, writes a letter to *Capt. Frost*, in which he says, after noting the misfortune of the *Concordia*:

"I can now say nothing in relation to the course you should take with the wreck and whatever can be saved. I feel satisfied that you will act for the best interest of all parties, and under advice or instruction from the offices. There are many articles of furniture which we can use on the *M*, which I would like to have, but which will not be wanted now. I should prefer the sale of everything postponed until I get down; but the boilers and machinery might be shipped at once to New Albany, to *Phillips, Hise & Co.*, to be landed at their

foundry; if this can be done, I would advise it, as the best means of selling it to advantage."

This letter was received by *Capt. Frost* on the 9th of November, and shown to *Mr. Snethen* on that day.

Assuming that the captain, for the preservation of the steamer and her cargo, had full power to do what a wise and prudent man would think most conducive to the benefit of all concerned, during the existence of the necessity for his exercising his power. When we read this letter, and consider the circumstances in which the captain found himself, we cannot entertain a doubt that it conferred on him authority to act according to his best judgment in relation to the interests of the writer, and justified him in making any lawful contracts or expenditures called for by the exigencies of the occasion.

*Frost* was however insured, and had abandoned for a total loss. The plaintiff was not insured. *Frost's* interest was, that the steamer should not be saved, but that his abandonment and right of recovery should be fixed. At the same time he had his duty to perform, which was to act for the best interest of all concerned; a very awkward relation to occupy.

It appears, from the evidence, that *Snethen* was determined, from the beginning, to raise the boat, and that he had no directions from *Frost* to do any such thing. *Frost* acted on the reserve as to this project, and his interest was, that it should not be undertaken. *Snethen* knew this, but he was the agent of the bell boat and of the underwriters, and if he could convert this total into a partial loss, it would be money in the pocket of the underwriters; and it was further his interest to do the best he could for the bell boat, who would be engaged with her men on the spot, and obliged, in some sort, to prepare for the raising of the boat, by taking out her cargo.

*Frost* made no contract, and would make none to raise the boat, and the affair was *Snethen's* own, for the benefit of parties whom he represented, and not of the plaintiff. These are the conclusions we have come to, from the testimony of both *Frost* and *Snethen*.

*Frost* says, that he never made any objection to her being raised, but did not want her raised. His idea was, to have the machinery taken out and shipped to New Albany or Louisville, where steamboats are built, according to the plaintiff's instructions. *Snethen* acted with his eyes open, according to his views of the interest of those whom he represented. The plaintiff was absent, and *Frost* declined acting for him, in making any agreement as to the raising of the boat.

The hull of the steamer was not worth the expense of saving. They all knew this, and *Snethen*, under this state of facts, had the boat raised and brought to New Orleans.

Although *Frost* was silent as to the doings of *Snethen* and the workmen, in raising the boat, yet nobody was deceived by it, still less *Snethen*, who can gain no advantage from the position of *Frost*, which he created, by not accepting the abandonment of his interest insured.

The district judge considered the claim for raising the steamer, and bringing her to New Orleans, exclusively as one of salvage, and adjusted it on the principles of marine salvage. He thought he was allowing all that could rightfully be asked, in giving *Dodge*, the owner of the bell boat, one-half the proceeds of the steamer, resulting from the sale by the port wardens, on the 24th November, to wit, one half of \$3650.

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We are not satisfied that the case is one to which the principles of marine salvage are applicable, nor that the facts constitute the ingredients of what we held in law, to be salvage services; but this objection is only to the principle of the adjustment, which, under the circumstances, we would, in an ordinary case, consider inapplicable. But the defendant has no right to complain of this mode of adjustment, for *Snethen* undertook the business, on the exclusive footing of salvage. He told *Frost*, "if the diving bell boat succeeded in raising the *Concordia*, the boat would be entitled to salvage; if she failed, it would be her own loss." He made a salvage adventure, exclusively so, and had no right to expect, and did not expect, any other mode of reimbursement.

It has not been attempted to defend the sale of the steamer, by the port wardens, and it follows, of course, that *Dodge* could acquire no rights by his purchase. Nor do we consider, that he had, in any legal sense, the right of possession of the steamer, from the circumstance of having raised her by means of his boat.

We understand the free and full possession of the wreck given to him by the contract, as meaning nothing more than a possession, or holding, for the purpose of saving the cargo and property, and the exclusion of all interference with his work, and not a possession adversely to the owner.

It seems to follow, from these premises, under the facts established, that *Dodge* had no right to have the steamer repaired, at the expense of the plaintiff; and that he is only responsible for the repairs, as he, or the steamer, was benefited by them.

*Marcy*, who repaired her, says, her hull was worth nothing before she went into dock, and after the repairs, which cost \$2100, she was worth \$2500. Four hundred dollars were gained by the repairs, and the plaintiff is chargeable with two-thirds of the cost of repairs, say of \$2137 03.

The amount allowed by the district judge, for raising the boat and bringing her to New Orleans, is \$1216 66.

Our impression, throughout this investigation, has been, that the plaintiff could be subjected to no charge in all this business, unless it inured to his benefit. The evidence is quite defective as to some points, which would have enabled us to bring the subject to some accurate test. Had the amount insured on cargo been proved; had the daily usual earnings of the boat been in evidence, we then might have ascertained what other interest there was which was operating in throwing these charges upon the plaintiff, and to what extent the time of the boat had been paid for by the \$4000 allowed for saving the cargo. No details of the mode in which this account was adjusted were given.

So far as the plaintiff's interests were concerned, *Snethen* was, throughout, a volunteer, acting for the interests of those he represented. In serving them he aided the plaintiff most unquestionably, but we think it ought to be shown, as nearly as it was susceptible of proof, to what extent the expenditures incurred inured to the benefit of the latter. The repairs put upon the boat by *Salter* and *Marcy*, inured to his benefit, and he must bear his share of them. That something is due for the other works, we think is clear; but great uncertainty rests upon the beneficial result of most of the charges.

Neither party asks the case to be remanded. It was incumbent on the defendant, in reconvention, to prove the extent to which the expenditures inured to plaintiff's benefit, in order to charge him with them in this distribution of the proceeds of the steamer.



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After a thorough examination of the subject, we are satisfied that the judgment of the district court, as an equitable adjustment of these very complicated relations, is as near the justice of the case as we can come, by any consideration in detail, and ought to be affirmed.

The judgment of the district court is therefore affirmed with costs; the costs of the court below to be paid out of the proceeds of the sale.

PRESTON, J., dissenting. The steamboat Concordia was sunk near Fort Adams, on the 15th of October, 1850, in eight feet water and six feet mud. Seven days afterwards, and when a rise of water was anticipated, which would have rendered it impossible to raise and save the wreck, an agreement was made with Dodge, the owner of a steamboat with diving bell and submarine apparatus, to save the cargo; and, I think, by a fair and liberal construction of the agreement, was to save the wreck also if possible. What other meaning can be given to terms in the agreement, to give him the free and full possession of the wreck under water? At all events, it cannot be disputed that, a few days afterwards, those interested in the property who were present in the State, employed him to raise and save the wreck, and the agents of all acquiesced. And furthermore, it is not to be admitted that any of them interested, from motives growing out of insurance, should be indulged in letting her go to destruction while there was a possibility of saving her; and the implied consent of all to raise and save the boat is to be presumed.

The salvage, upon any of these hypothesis, was to be settled and fixed by arbitrators, appointed by the parties in advance, that there might be no suspicion of bias. The record satisfies me that all parties interested, expressly or by silence assented to this arrangement.

Dodge raised, saved and brought the wreck to New Orleans. The arbitrators agreed upon, awarded him three thousand dollars salvage, amounting to about his expenses, all of which he would have lost if he failed in his enterprise. I am not convinced, by the evidence, that this sum was by any means half the value of the boat floating, with her engine and machinery on the surface of the water. Even if it was more, I look upon the boat, engine and machinery at the bottom of the Mississippi and six feet in mud, as substantially a derelict. If half the value be allowed for taking up a derelict, floating on the surface, that or more might be allowed for diving to the bottom, making the fastenings and bringing the derelict, by herculean efforts, from beneath the bottom, for she was in the sand, taking her safely to New Orleans, and restoring her to commerce.

Salvors cannot *exor termini* bring the owners in debt—a result the district judge much feared; but such circumstances as existed in this case may leave them but little. Witnesses have been examined to show the value of the engine and machinery, if raised and taken to Louisville or Cincinnati. I doubt if they would have sold for much at the bottom of the Mississippi, near Fort Adams. If so available at Louisville, why did not the owners keep and use it, with their boat, when set afloat, by paying the mere expenses of raising her, allowed as salvage?

I do not believe the whole would have sold for much, at the bottom of the river. By the labor, expense, and I may say risk of life, the salvors have saved something for all the owners. Their reward has been fixed by judges appointed by those owners at barely the expense, the whole of which was risked on the event of success, as well, perhaps, as the health and lives of those employed above and under water in the enterprise. The district judge has brought the salvors greatly in debt under such circumstances.

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I think his judgment should be reversed, and the whole amount of the salvage awarded by the arbitrators, selected by the parties, should be paid out of the money in court.

**MARY ADELE NELDER, Wife of L. L. Kerr, v. Testamentary Executors of L. B. MACARTY, et al.**

The notary concluded the will thus: "This will has been dictated to me by the sieur *Macarty*, and I, the said notary, have written the whole in my hand, such as it has been dictated to me by the said testator, in the presence of the witnesses hereafter named and undersigned," &c. The question being, whether the words used import that the will was dictated in the presence of the witnesses, or was only written in their presence. *Held*: The words, in the presence of the witnesses hereafter named and undersigned, in this connection, would apply indiscriminately to the whole clause—to the dictation as well as to the writing.

When the father, by will, in favor of a natural child, disposes of the portion of his estate permitted him by law to dispose of, the only restraint which the law imposes on the rest of his property is, that the disposition of it be not in favor of any other persons than legitimate relations or a public institution.

**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. A. N. Ogden and C. Roselius*, for plaintiff. *Benjamin and Micou, Jania and Taylor, Pitot and Eyma, Maurian and LeGardeur*, for defendants. By the court:

**EUSTIS, C. J.** This appeal is taken from a judgment of the court of the Fifth District of New Orleans, by which the last will and testament of the late *Louis B. Macarty* was annulled, so far as relates to the plaintiff's interest in the succession; and they were adjudged to recover their hereditary portion, to wit, one-fourth of the effects thereof.

The ground on which the judgment appealed from is based, is a question of fact; and the conclusions of the district judge, after recapitulating the evidence and commenting on it with great care, are thus given:

"In this conflict of the testimony of the witnesses to the will, and failure of the recollection of the notary who received it, upon a point which is left doubtful by the phraseology of the will, a point which is held to be essential to the validity of a nuncupative will by authentic act, as we have seen above, it is my duty to pronounce as not proved, that the will in question was dictated by the testator to the notary, in the presence of the witnesses; and, for want of this formality, that the said will is invalid as regards the plaintiffs."

There were other demands against different parties, cumulated in the plaintiff's petition independent of the validity of the will, but the district judge confined his decision to this single point, reserving all other matters for further adjudication.

The nuncupative will of the testator, *L. B. Macarty*, was by public act. To give validity to this class of instruments, the law requires that it be received by a notary public, in the presence of three witnesses residing in the place where the will is made, or five non-resident witnesses. It must be dictated by the testator, and written by the notary as it is dictated. It must then be read to the testator, in the presence of the witnesses. Express mention must be made of the whole, observing that all these formalities must be fulfilled at one time, without interruption and without turning aside to other acts.

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Our learned brother was of opinion, that, by the phraseology of the will, it was doubtful whether the will had been dictated by the testator, to the notary, in the presence of the witnesses.

The will is in the French language. The concluding part reads thus, in English: It is thus that this will has been dictated to me by *Jean Macarty*, and I, the said notary, have written the whole in my own hand, such as it has been dictated to me by the said testator, in the presence of the witnesses hereafter named and undersigned; then having read, in an audible and high intelligible voice, and in presence of the witnesses, the present will to the said testator, he has declared, in the same presence, that he had heard and understood it well, and that he ratified it in its whole contents. Of which act, done and passed immediately, without interruption or diversion to other acts, at New Orleans, in the dwelling house of the testator, the day, month and year aforesaid, in presence of *Jean Baptist Dejan* the elder, *Pierre Frederic Thomas* and *Pierre Pascalis Labarre*, witnesses known and domiciliated in this city, &c.

The doubt of the district judge was, whether the words used import that the will was dictated in the presence of the witnesses, or was only written in their presence.

We are relieved from the task of grammatical criticism, which a solution of this doubt might otherwise have imposed on us, by the research of one of the counsel for the defendants. He has shown, from the decisions of courts in France, and the opinions of their first jurists, that in formulas like that made use of by the notary in this will, the words "in the presence of the witnesses hereafter named and undersigned," in this connection, would apply indiscriminately to the whole clause, to the dictation as well as the writing.

We adopt this conclusion the more readily, as it accords with the construction which, we think, the general sense of the whole sentence necessarily implies, under the rules of a sound legal interpretation. This construction is also concurrent with the statements in the initiatory clause of the will.

The will is then before us under the certificate of the notary, that it was dictated to him by the testator, in the presence of the witnesses, and written by the notary, as dictated, in their presence; and this certificate is given by virtue of the authority vested in him by law as a public officer.

It is always with the greatest caution, that we interfere with the decision of a judge on a question of fact, when he had the advantage of hearing the examination of the witnesses testifying concerning it, and when the decision rests upon the degree of credit given to them by the judge. In the present case, no difficulty of this kind presents itself. In giving to the testimony of the witnesses the effect which the district judge assigned to it, the will must stand according to the rules of law. The judge considered the testimony of the witnesses conflicting. Be it so. We then have, in support of the will, the force and effect which the law gives to an authentic act, and the presumption which it recognizes in favor of the official acts of public officers, done by virtue of its authority. According to the ordinary rules of evidence, we think it must be considered, as proved, that the will was dictated by the testator to the notary, in the presence of the witnesses, as certified by him.

When we consider that the witnesses, whose testimony is held as conflicting, were examined as to the detail of facts which had transpired more than four years previous, a greater concurrence could not be expected, on matters resting on frail memory, from truthful and conscientious men. And when the testi-

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mony of one of the witnesses, that of *Dejan*, the elder, is urged as impugning the accuracy of that of the others, and his respectability and intelligence are adduced in giving weight to his declarations, it would not be reasonable to leave out of the estimate one of the elements of his respectability—his age—the length of time in which his respectability has been acquired.

Under ordinary circumstances, there are few wills which would be sustained, if courts could set them aside, on testimony like that adduced in the present case.

The plaintiffs are heirs of a half-sister of the testator, *L. B. Macarty*, and were, at the time of his death, his heirs, by the right of their mother. *Mrs. Lalaurie* was the full sister of the testator, and co-heir with the plaintiffs. Her heirs are the principal defendants.

The testator having disposed of one-fourth of his estate in favor of a natural daughter, bequeathed the residue to his sister, *Mrs. Lalaurie*.

The plaintiffs claim from the heirs of *Mrs. Lalaurie*, one-fourth part of the three-fourths of the succession thus bequeathed to her, and inherited by them.

They contend, that under the 1474th article of the code, after the testator has exercised the privilege of disposing of one-fourth of his property in favor of his natural child, the rest of it must go to his relations in the regular order of succession, no disposition having been made of any portion of it, in favor of a public institution.

This construction which the counsel for the plaintiffs give to the article, would make the legitimate relations of the deceased his forced heirs, in the cases provided for. The very terms of this article, we think, exclude any such interpretation. We think the law on this subject has been settled, in the cases of *Prevost v. Martel*, 10 R. R. 516, and *Compton v. Prescott*, 12 *ib.* 62.

When the father disposes by will, in favor of his natural child, of the portion of his estate permitted him by law to dispose of, the only restraint which the law imposes on the rest of his property, is that the disposition of it be not in favor of any other persons than legitimate relations, or a public institution.

We therefore conclude, that the claim of the plaintiffs to one-fourth of three-fourths of the succession, under this article of the code, has no foundation in law.

There are several other matters remaining undecided in this cause, which has not been prepared with a view to their termination at this present time. It must therefore be remanded.

The judgment of the district court is therefore reversed. And on the claims of the plaintiffs, to annul and make void the last will and testament of *L. B. Macarty*, deceased, and to recover from the heirs of *Mrs. Lalaurie* one-fourth of three-fourths of the succession of the said *Macarty*, it is ordered by the court, that judgment be rendered for the defendants, with costs. And as to other matters at issue between the parties, it is ordered, that the will be remanded for further proceedings, the plaintiff paying the costs of this appeal.

## M. L. BADILLO AND S. CHAUVIN v. FRANCISCO TIO.

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An executor who withholds property from the legal heirs, after his executorship has expired, is in bad faith. He, consequently, can claim no compensation for the administration of it while the tortious possession lasted.

All who convert the property of others to their own use, are in bad faith; but when the sale itself has been fair, and the full market value obtained, the price, with interest from the date of the sale, is the measure of damages, and the rule is not affected by the subsequent rise or fall in the value of the thing sold.

The executor charged the succession with one hundred dollars, spent in furnishing the slaves of the deceased with mourning dresses. *Held*: It was an act proper in itself, and should not have been opposed.

**A** PPEAL from the Third District Court of New Orleans. *Kennedy, J.*  
*P. E. Bonford, H. R. Denis, and J. Ad. Rozier*, for plaintiffs. The position assumed by the plaintiffs, is that the defendant owes them the shares of stock, or their value at the time he was ordered by the decree of the court to restore them, together with all the dividends which accrued thereon in the intermediate time. The defendant was a possessor in bad faith; he was retaining possession of property to which he had no legal right, and against the will of the real owner. If he sold or disposed of that property, he did so without the shadow of authority to justify the act. He cannot weaken the position of the plaintiff in such a sale. And certainly he has no right to reap advantage from his illegal acts, as he seeks to do, by crediting the plaintiffs with the proceeds of the sale simply, retaining in his own hands the interest for a period of six years.

The principle contended for by the plaintiffs is amply sustained by the authorities. See *Brown et al. v. McGran*, 14 Peters, 479. *Neilson v. Morgan*, 5 M. R. 256. *George v. McNeill*, 7 L. R. 124, and the recent case of *James S. Foley v. Bell and Stebbins*, 7th Annual.

The inferior court rejected the credit as it stood, and allowed in its stead the value of the several stocks, with the dividends which had accrued thereon, as established by the testimony of *Messrs. Matthews, Palfrey and Wood*.

The several items of credit to the succession, for the rents of the real estate, were opposed, on the grounds that the sums thus credited, were not as large as the property, under proper and judicious management, would have produced.

The opposition proceeded on the basis that the defendant, as a possessor in bad faith, was bound to account, not only for the revenues actually received by him, but for all such as he might have received, or such as the estate was capable of producing.

See the following authorities: *Duranton*, 4, No. 360. *Delvincourt*, 2, p. 11, in notes. *Touillier*, 3, No. 110. *Dullos Annuaire*, 11, No. 19.

*Janin and Taylor*, for defendant. The district judge declares, that the defendant is accountable to the plaintiffs for the highest price which the bank and insurance stock had, at any time before his decision was given, instead of the price for which it was sold. This decision cannot, we conceive, be sustained on any principle of law or equity. The defendant cannot be regarded as a trespasser, nor was it the intention of the Supreme Court, to authorize the district court to so regard him. The court decided that he was in bad faith. Now, what is the difference between good faith and bad faith? One regarded in law as being in good faith, makes all the fruits he gathers, his own. One in bad faith, is bound to make restitution to the true owner of the fruits. In the present instance, the defendant sold the stock, after he was put in possession as legatee, and long before the plaintiffs brought their action. He considered himself as the owner, and acted, as he conceived, for the best. This species of property is liable to great fluctuation. He acted as many a prudent man has done before, and sold it, because he believed it better to realize its then actual value, than to run the risk which, in the usual course of things, such property is

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subject. Let us suppose a case that has not been without example in our day, viz: That the stock, instead of increasing in value, had depreciated, and become worthless, in the same period of time. Would the plaintiffs then have been entitled to recover the price for which it might have been sold for, when the defendant was first put in possession, and before the depreciation took place? If we are permitted to judge from what has been already seen in this cause, it is pretty clear, that the claim would have been made; and then it would have been based upon an allegation, that they had been prevented from selling the stock, in consequence of its being detained from them. If they had had possession of the stock, it is altogether probable, that it would have been sold by them. At any rate, the contrary cannot be known, and it would seem altogether unreasonable and unequitable to suppose the contrary, in a case like the present. It is shown, that the price of the sale accounted for, was the real price of the stock at the time. And as it is not pretended that the sale was made unfairly, and under the influence of any improper motive, we are persuaded, the defendant ought to be made responsible only for the amount received by him. And this would seem to be in concurrence with the decision of this court in this case, with respect to the price of the slaves sold by the defendant. They were sold for much less than the appraisement of them in the inventory, and the amount of the appraisement was claimed. The claim was repeated, and the defendant held to be liable, only for what he actually received. Now, the principle on which that decision was made, is clearly recognized, in the case of *Gaulden v. McPhaul*, 4 Ann. 79. See *Kennedy v. Whetwell*, 4th Pjck. R. 466. *Watt v. Potter*, 2d Merlin's R. 76.

By the court:

Rost, J. This case was remanded last year, with directions to the district judge, to cause the defendant to render an account of his administration as executor of *Augustin Macarty*, and for other proceedings, in conformity with the opinion then delivered.

The defendant rendered his account accordingly. Some of the oppositions filed to it by the plaintiffs were overruled, and others were sustained by the district judge. The defendant has appealed, and the answer of the plaintiffs contains a prayer, that the judgment be amended in their favor. We will first notice their application. They ask that the judgment be amended in their favor, by charging, not the rent which the real estate produced, but the highest rent, according to the evidence, which it might have produced. Upon that evidence, the district judge came to the conclusion, that the real estate yielded as much as it was worth while it was rented.

We adopt his conclusion, but we are of opinion, that under the evidence, he erred in allowing rent for the two years during which the Camp street property was unoccupied. It was not in a fit condition to rent after the death of *Macarty*, with advantage to the estate, and could only be rented with very great difficulty, when it was.

The amount paid by Tio for attornies' fees, in the suit of *For v. Tio*, and in the settlement of the succession of *Macarty*, was reduced by the court, from \$2500 to \$1500, on the ground that, taking into consideration the small value of the thing in dispute in the suit, and the facility with which the succession had been settled, \$1500 was a reasonable compensation under the evidence, and the rule applied to such cases by the former and the present Supreme Court. The evidence is somewhat conflicting, but we are unable to say, that the view taken of it by the district judge is erroneous, or that it is not sufficient to rebut the *prima facie* presumption, that the payments made by the executor, are correct.

The claim of commissions for collecting rents, disbursing, superintending, &c., was properly rejected. After the executorship of the defendant had expired, he was in bad faith, in withholding the property from the legal heirs, and can

claim no commissions for the administration of it, while the tortious possession lasted.

The rule by which we determined the liability incurred by *Tio*, in consequence of the sale of some of the slaves of the succession in 1846, should have been applied to the stocks sold shortly after. All who convert the property of others to their own use, are in bad faith; but when the sale itself has been fair, and the full market value obtained, the price, with interest from the date of the sale, is the measure of damages, and the rule is not affected by the subsequent rise or fall in value of the thing sold. The circumstances attending the conversion in this case, are not worse against the defendant, than they were in the case of *The Draining Company v. Lizardi et als.*, in which, after solemn argument, this rule was recognized and enforced. 2 Ann. 281.

We think that the charge of \$100, paid for the mourning dresses given to the slaves of the deceased, should not have been opposed, and that the court erred in reducing it. It was an act, proper in itself, which a son would never disapprove, if done by the executor of his father, and which the plaintiffs, unknown to the deceased as they were, and coming to his succession much against his will, contest with bad grace.

The Supreme Court certainly never adjudged the payment of hire for the services of a dead negro. There is nothing relative to the slave *Jackson* in the decretal part of the opinion, and the opinion itself has been misunderstood. The court, supposing the slaves *Jackson* and *Liza* still in the possession of the defendant, stated that he must account for the hire of those slaves, making proper deductions for time lost. Had this been part of the decree, instead of a mere expression of opinion in the case, as it was then before us, the reservation made was sufficient to cover the contingency of the previous death of those slaves. It being shown in the present record, that *Jackson* had died shortly after *Macarty*, the time lost, embraces the whole period that has since intervened, and no hire should have been allowed for him.

It is therefore ordered, adjudged, and decreed, that the judgment of the court below, ordering the account filed by the defendant to be amended, be reversed as to the following particulars: 1st. As to the sum of one thousand dollars for two years' rent of the property, situated at the corner of Camp and St. Joseph streets, in the city of New Orleans. 2d. As to the sums with which the said defendant is ordered to credit the estate of *Macarty*, as being the estimated value of the stock mentioned in the inventory, and the dividends which accrued thereon since the opening of the succession, and in lieu thereof, the said defendant is ordered to credit the estate with the proceeds of the sales of the said stocks, as made by him on the 25th of July, 1846, together with legal interest thereon from the date of said sales, until paid. 3d. As to the amount charged against said defendant, for hire of the slave *Jackson*. And lastly. As to the reduction made in the charge against the estate, of the sum of one hundred dollars, for mourning dresses for the slaves, which is ordered to stand in the account for the full amount thereof, as charged by the defendant. It is further ordered, adjudged, and decreed, that the judgment of the inferior court be in all other respects affirmed, the costs of this court to be borne by the appellees, and those of the court below by the defendant.

DICKSON & Co. v. MORGAN. D. MELVILLE, Garnishee.

An authority to the agent "to appear before all judges and justices of the peace, in any court or courts, there to do, say, pursue, implead, arrest, attach, and prosecute, as occasion shall be or require," does not authorize the agent to acknowledge a debt.

The power of answering interrogatories on oath, cannot be conferred on one person by another. *Eustie, C. J., and Root, J.*

**A** PPEAL from the Second District Court of New Orleans, *J. N. Lea, J. Durant and Horner*, for plaintiff. *J. Q. Bradford*, for defendant.

The question of the agent's authority, arose out of the following power of attorney :

"Know all men by these presents, that on this, the 18th day of May, in the year of our Lord, 1848, I, *David Melville*, of the city and State of New York, have made, ordained, nominated, and appointed, and by these presents, do make, ordain, nominate and appoint in my place, and depute *William E. Camp*, of the city of New Orleans and State of Louisiana, my true and lawful attorney ; giving, and by these presents granting unto my said attorney, full power and lawful authority for me, the said constituent, in my name and for my use and behalf, to ask, demand, sue for, and by all lawful ways, to recover and receipt of and from all and every person or persons whatsoever, for all such sum or sums of money, goods, wares, merchandise or effects, as now are, or shall or may hereafter be in any person or persons' hands or possession, due, owing, or payable to me, the said *Melville*, whether by bond, note, bill, book account, consignment, or by whatever reason or means whatsoever, none excepted or reserved ; and to that end, to account, view, state, settle and adjust all accounts, and the balance thereof to receive, and upon the recovery and receipt in the premises, to give one or more acquittances, or other sufficient discharges in due form of law. Further, I do hereby authorize my said attorney, to make and sign for me and in my behalf, all promissory notes, bills, drafts and bank checks ; to dispose and draw money from all and any bank whatsoever ; to purchase and sell bills of exchange, as well as articles of jewelry and merchandise ; also, if need be, to appear before all judges and justices of the peace, in any court or courts, there to do, say, pursue, implead, arrest, attach and prosecute, as occasion shall be or require ; also, to compound, compromise, conclude and agree for the same, by arbitration or otherwise, as the said attorney shall think proper ; and generally, in the premises, to do, execute, and perform, all and whatsoever shall and may be requisite or necessary, in as full and ample a manner, and to all intents and purposes, as the said *Melville* might or could do, were he personally present. He, the said *Melville*, promising to hold for good and valid, and to ratify the same, all and whatsoever his said attorney shall lawfully do by virtue hereof.

"In witness whereof, the said *David Melville*, hath hereunto set his hand and seal. Done and passed at New Orleans on the day, year and date aforesaid, in presence of the undersigned witnesses."

By the court; (*Preston, J., dissenting.*)

SLIDELL, J. We concur in the conclusion of the district judge, as to the insufficiency of the power of attorney.

Judgment affirmed, with costs.

The following is the judgment of the district court, *J. N. Lea, J.* "This case is presented upon the rule taken herein, on the 11th July, 1851, upon *W. E. Camp*, as agent of *David Melville*, made garnishee herein, to show cause why said *Melville* should not be condemned to pay the whole amount of the judgment rendered against the defendant, with costs, on the ground, that the answers of the said garnishee, through his said agent, are in part not categorical, but evasive ; and, further, that they show that, at the time of the attach-



ment, he had in his hands sufficient funds of the defendant, to pay the amount of the plaintiff's claim.

"The issue presented in this rule, does not differ materially from that which was formerly taken in this case, on the 11th December, 1850, and was passed upon by a judgment of this court, rendered on the 23d December, 1850. It is to be observed, that in this rule, as in the former one, no traverse to the alleged answers of the garnishee is made. The plaintiff does not seek to obtain a judgment, by introducing evidence to show that the answers are not true, or that *Melville* had in his hands a sufficient amount of funds to meet the plaintiff's claim. The plaintiff looks to the answers themselves, as the basis of his application for a judgment against *Melville*.

"In the reasons for judgment, rendered upon the rule, taken on the 11th December, 1850, it was considered, that there was no sufficient proof of *Camp's* agency, to justify the court in rendering a judgment against *Melville*; that the power to acknowledge a debt, must be express and special.

"On the trial of this rule, a power of attorney from *Melville* to *Camp*, was filed in evidence, which was executed prior to the date of the attachment issued herein. This power of attorney, as I construe its provisions, confers certain general and special powers of administration. It does not, however, authorize the agent to acknowledge a debt on behalf of his principal, except by way of compromise or adjustment."

EUSTIS, C. J. The power of answering interrogatories on oath, we do not think can be conferred by one person on another.

ROST, J., concurred with the Chief Justice.

PRESTON, J., dissenting. In the suit of *Dickson & Co.* against *Morgan*, the plaintiffs cited *Melville* through his agent, *Camp*, who answered interrogatories as the agent of *Melville*.

This court were of opinion, that it was not proved that *Camp* had power to answer the interrogatories for *Melville*, or to be cited to defend him in court, reserving, however, to the plaintiffs the right of further proceedings, to show that *Melville* was liable.

The plaintiffs have since discovered a power of attorney from *Melville* to *Camp*, and rely upon it as sufficient to bind the former, by the answers of *Camp*.

It is a general power of attorney, and, as to appearances in court, contains the following clauses: "granting unto my said attorney full power and authority for me, the said constituent in my name, and for my use and behalf, to ask, demand, sue for, and by all lawful means to recover and receipt of and from all and every person or persons whatsoever, for all such sum or sums of money." These clauses give power to the attorney to prosecute suits.

The district court was of opinion, that the instrument did not give him power to acknowledge a debt, which must be a special power, and that his answers, as garnishee, might have that effect; and, indeed, that effect of his answers is sought in this suit.

The power authorizes the attorney to sign notes and bills, which certainly are the acknowledgement of debts. Immediately afterwards, power is given to appear before all judges and justices of the peace, in any court or courts, there to do, say, and prosecute, as occasion shall be or require, also to compromise, compound and agree to arbitration. The principal, in the beginning of the power, authorized his attorney, by a redundancy of language, to appear as plaintiff

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and prosecute. These last clauses, after giving power to acknowledge debts, appear sufficiently broad to authorize his appearance to defend suits, and to appear for other purposes in courts, and would be surplusage, if they had not that effect. It is a well settled rule of construction, to give effect to all the clauses of an instrument, rather than to regard them as useless.

I think, therefore, the letters of attorney produced, gave power to *Camp* to acknowledge debts, and to appear in court to defend as well as prosecute suits, and for all other purposes.

The objection, that he might greatly injure his constituent by negligence or abuse of his power, should have been considered when it was given, and moreover, if the abuse amounted to fraud, the courts could relieve him from its effects.

The answers of *Camp* set up claims of his principal against the assets of *Morgan* in his hands, and there must necessarily be a contest between the parties, as to preferences claimed by them, on the funds or assets attached.

These controversies, the district court has not tried, and this court could not, until he should have rendered judgment upon them, after evidence and hearing the parties.

I think the judgment of the district court should be reversed, and the case remanded for further proceedings according to law; the appellee to pay the costs of appeal.

### J. A. KING v. A. REED.

Where there is no real foundation for a claim over three hundred dollars, nor any legal ground for supposing such an amount can be recovered, the appeal will be dismissed.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Wolfe and Singleton*, for plaintiff. *Hite and Gaither*, for defendant. By the court :

SLIDELL, J. We think this appeal should be dismissed for want of jurisdiction, there never having been a real foundation for a claim over \$300, or any reasonable legal ground for supposing such an amount could be recovered. This results from an inspection of the allegations of the petition, and the items charged in the account annexed to it. The administration of justice, with that degree of care and accuracy which we would desire in cases really entitled to our jurisdiction, is scarcely practicable, and we therefore must, of our own motion, refuse to hear causes that do not fairly pertain to our province.

Appeal dismissed at costs of appellant.

PRESTON, J., dissenting. I am of opinion that the plaintiff sued for the whole of his claim, believing himself entitled to recover it, and not merely to give jurisdiction to the Supreme Court. Having sued *bonâ fide* for damages exceeding three hundred dollars in amount, although the grounds for a portion of his claim are clearly untenable, still I think him entitled to the opinion of this court on the whole claim.

Opinion of PRESTON, J., on the merits : The plaintiff, residing in Tennessee, purchased, through the agency of his commission merchants in New Orleans, from the defendant, sixty-five Mexican and thirty-five city hides, to be shipped

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to Tennessee, and there tanned and dressed. He paid the highest price and for the best quality, and the hides, by their external appearance, were of that quality. They were immediately shipped to Tennessee, and put into the plaintiff's tannery. There is no proof that they were injured during the transportation, or in the tannery. On the contrary, the negative is proved as far as possible.

In the process of tanning, the Mexican hides were discovered to be very defective, full of holes, rotten in places, and almost worthless. It is proved, that this is often the character of Mexican hides, though apparently good and sound, until subjected to the process of tanning, until then, the defects are hidden.

The plaintiff sues for the difference between the price paid by him for sound hides, and the actual value of those purchased.

The express provision of the Civil Code, seems to apply to the case. The seller is bound to two principal obligations, one of which is, "that of warranting the thing which he sells." Art. 2450. "The warranty of the seller has two objects," one of which is, the hidden defects of the thing sold, or its redhibitory vices. Art. 2451. Apparent defects, are those which can be discovered by simple inspection. Code 2497. The seller does not warrant against these. Hidden defects, are those which are not discovered by simple inspection, but require some process of examination to find them out. The seller warrants against such defects.

The district judge considered it proved, "that the Mexican flint hides are, from some inherent defect in the hides themselves or in their curing, an uncertain article, not to be judge of by any experience, until they have been actually tanned, in the course of which, they often perish or become useless; that this is understood amongst tanners and traders, who, nevertheless, purchase them, pay high prices, and obtain a greater profit when they turn out well, and knowing all these things, take the risk."

Such an understanding is opposed to the express provision of law which we have quoted; and if an exception to the law exists as to Mexican hides, I think it should be established by express agreement, or by stronger evidence of an implied agreement, resulting from a general understanding, than that of the agent of the seller alone, in an isolated case.

It is said the meaning of apparent defects, mentioned in our code, are those defects known to the buyer, because that is the interpretation of French commentators on similar provisions of their code. There is no doubt, the terms embrace all defects known to the buyer, and indeed more, all those which might have been known by the exercise of his physical senses, without going through some process of examination. But the very question in this case is, whether the buyer knew or might have known of the defects complained of, without a process of examination? The argument seems to be, that he knew of the unseen defects, because there was a general understanding of buyers to waive them as to the hidden defects in Mexican hides. We repeat again, that such an opinion proved by the agent of the seller, in a simple case, is not sufficient to establish such an understanding against buyers, in opposition to the express words of the Civil Code.

It is possible, that the express provisions of the code, ought not to be applied to the sale of Mexican hides, for the reasons urged to show, that they are not applicable. But as they are general, and in terms apply to all articles of mer-

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chandise, they can be waived as to the particular articles, only by an express or implied agreement.

We cannot affirm this judgment upon the evidence as exhibited in the record. But the district judge states, that the testimony is not well taken down, and that he desires it to be understood in this case, and all other cases, that he decides by what the witness states, and not by the clerk's notes. Without this observation, we were inclined to remand the cause, it renders our duty imperative.

We are not prepared to say, that the testimony offered by the defendant, and admitted by the court, as to the understanding in selling and buying Mexican hides, should have been rejected; but would like, in case of another appeal, testimony also on behalf of buyers and tanners as, to their understanding in relation to unsound hides, the defects of which were not apparent. Provisions of law, can be waived only by an understanding on both sides.

The judgment should be reversed, and the case remanded for a new trial; the costs of the appeal to be paid by the appellee.

Application for re-hearing refused.

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L. M. ANDERSON v. A. B. B. IRWIN.

Judgment cannot be recovered against the owners of a steamboat, on a note given by the clerk, although on its face it purports to have been given for stores furnished the boat. If the note is relied on to bind the owners, as a receipt for stores, it must be proved that the clerk who made the note, was clerk at the time that they were received.

A note, given by the chief clerk of a steamboat for stores, is such a settlement of the account, as interrupts the prescription under article 3499 of the code. (*Preston, J., dissenting.*)

**A** PPEAL from the Third District Court of New Orleans, *Kennedy, J.* *J. S. Whitaker*, for plaintiff. *R. H. Barker and Marr*, for defendant. By the court; (*Slidell, J., absent.*)

*EUSTIS, C. J.* I do not recognize the doctrine which authorizes the clerks of steamers to bind their owners by promissory notes, issued by them, as in the case under consideration.

If the document relied upon is to be considered as binding on the owner, as a receipt for stores received for the use of the boat, for which the clerk was authorized to give a receipt on delivery, it ought to have been shown that *Dougherty* was the clerk at the time of the delivery of the stores.

This the evidence does not establish. I think the case is with the defendant on the evidence.

It is ordered, that the judgment of the district court be reversed, and judgment is rendered for defendant, with costs in both courts.

*ROST, J.* I concur in the opinion of the Chief Justice.

*PRESTON, J., dissenting.* This suit is instituted on the following instrument:

§565 93. New Orleans, January 17, 1848. One day after date the steamer *Clarksville* and owners, promise to pay to the order of *Messrs. Lillard, Mosby & Co.*, five hundred and sixty-five dollars and ninety-three cents, for stores furnished up to January 1, 1848.

Endorsed, *Lillard, Mosby & Co.*

*W. D. DOUGHERTY,*  
Clerk steamer *Clarksville*.

It is proved that *Irwin* was the owner of the steamboat *Clarksville*, and *Dougherty* the first clerk. The defence is, that *Dougherty* had no power to bind the owners of the boat by a promissory note, or to acknowledge a debt, because, for those purposes, the power under article 2966 of the code must be express.

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Conceding this, a supplemental petition was filed, alleging that stores were furnished by *Lillard, Mosby & Co.*, to the steamboat *Clarksville*, to the amount and value stated in the note, and this is fully proved by other evidence than the note.

It is next contended, that this claim for supplies of provisions and liquors to a boat, is barred, under art. 3499, by the prescription of one year. The next article declares, that this prescription ceases when there has been an account acknowledged. The expression in the French part of the code is "*compte arrêté*" which means "an account stated."

I think the instrument sued upon amounts merely to the statement or settlement of the account of *Lillard, Mosby & Co.*, against the steamboat and owners, up to the 1st of January, 1848.

It is proved to be the universal usage and custom in steamboats, for the first clerk to keep or settle the accounts of the boat. It is his special business. The appointment of the first clerk of a steamboat, under this general usage, by the very nature of the office, gives power to state or settle the accounts of the boat.

The terms import, rather than imply the power, just as the appointment of the clerk of a merchant amounts to an express power to keep his books, or the appointment of the clerk of a court is an express authority to keep the records. The very name of the office embraces these powers. The settlement of the account and the statement of the balance due, by the signature of the clerk, is the acknowledgment of the account, or "*compte arrêté*" established by the code, as the means of stopping the prescription of one year. It was so expressly held by the late Supreme Court in the case of *Davis v. Houden et al.*, 10 R. R. 402, and has become a rule of law, on the faith of which the universal usage invoked in this case has grown up. I approve of the principle, and think that justice requires its application to the present case, and that no law forbids it.

I think the judgment of the district court should be affirmed.

Application for re-hearing refused.

### J. W. HASSARD v. MUNICIPALITY No. TWO.

By an ordinance of the Second Municipality, passed May 11, 1847, the recorder was empowered to suspend any police officer for dereliction of duty, and report the same to the council.

In this case the defendants' officers had neglected the defence; the trial was *ex parte*; the right of the plaintiff to recover doubtful. The cause was therefore remanded.

**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. J. M. Wolfe* and *P. S. Warfield*, for plaintiff. *Randel Hunt*, for defendant.  
By the court:

PRESTON, J. The plaintiff was elected sergeant of the night-watch of the Second Municipality of New Orleans, and commissioned by the mayor on the

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11th day of May, 1850. His wages were fixed by an ordinance at the sum of fifty-five dollars a month. On the 12th of July, 1850, he was definitely suspended by the captain of the night-watch, in obedience, as stated in his notice, to a resolution of the police committee, though the resolution is not produced.

The 11th section of an Act of the General Assembly, approved the 18th of March, 1850, prescribes "That no committee of said councils shall ever be vested with power to appoint to office; and no officer shall be removed from office unless by a resolution of the council." The petitioner was not removed, but suspended from office. We are bound to believe the captain of the night-watch reported his action on this subject, as on all others, to the recorder of the municipality. The recorder had power to suspend any police officer for dereliction of duty, reporting the same to the council for their decision. Ordinances by Southmayd, 322, passed 11th May, 1847. The action of the recorder does not appear, nor does that of the plaintiff. For aught that appears, he submitted; made no protest or application to the Council of the Second Municipality to be reinstated in his office and in the discharge of the duties, for the performance of which they had elected him. He remained quiet to the end of the year without doing duty a single night, so far as appears, and then sued for a year's salary.

The municipality filed no answer, made no defence to the suit, and judgment was rendered against her. The city has not the means of showing a meritorious defence on an appeal under such circumstances. But, for the reasons stated, we see no merit in the plaintiff's claim. We have been obliged, on his side, to search for ordinances not given in evidence. We have heretofore recommended that ordinances, relied upon, should be given in evidence. They cannot have the notoriety given to general statutes of the State.

We do not think this case has been properly investigated on either side, and lament the negligence of the officer who did not have the rights of the council, which elected him, vindicated through him, and the service to the public, for which he was so highly paid, performed by him; and that the authorities of the city, also so highly paid, should neglect to defend their suits by proper and timely answers, proofs and arguments.

We think that justice requires that the merits of this case, on both sides, should be presented and examined by the district court. Causes may exist, and be presented by an answer, which would justify the proceedings of the captain of the watch and police committee, or exonerate the city from a burden imposed upon it, without any consideration or value received.

In a case of apparently clear right, on an *ex parte* trial, we would not relieve the city from loss or damage on account of the errors or defaults of its officers; but in doubtful cases, we have felt it our duty to do so. See the case of *Stewart v. Willman and The First Municipality*, February, 1851, No. 1886.

We think the ends of justice require that this case should be remanded for a new trial, after making up proper pleading.

The judgment is reversed, and the cause remanded for further proceedings, according to law. The appellee is condemned to pay the costs of the appeal.

SLIDELL, J. I do not find in the transcript, satisfactory evidence that the plaintiff was dismissed from office by a competent authority; and, in the absence of such proof, the plaintiff, who does not pretend that he has rendered services to the amount claimed in the petition, should not have had judgment for that amount.

I therefore concur in the reversal of the judgment.

## MUNICIPALITY NO. TWO v. H. W. PALFREY et al.

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There is no evidence of the dedication of the lot bounded by Camp, Coliseum and Robin streets, in the suburb Lacourse, to public use.

The failure to pay taxes on property, even for a great length of time, does not prove an abandonment of the property to public use.

In an original plan of division of suburban property, there was the same indicia of the dedication of a lot to public use, that there was of the streets. The streets and the lot were not separated by lines. The lot was not subdivided for sale, nor colored like the squares around, which were for sale. There was a cessation of all use of the lot as private property for forty years, and an abandonment of it to the public for that time, nor were any dues or taxes paid upon it. *Held*: that this amounted to a dedication of the lot as a public place. *Preston, J.*, dissenting.

**A** PPEAL from the Third District Court of New Orleans, *Kennedy, J. R. Hunt* and *W. D. Hennen*, for plaintiff. *Soulé* and *Barton*, for defendants. By the court: (*Slidell, J.*, absent.)

**EUSTIS, C. J.** The municipality claims a certain lot of ground of an irregular form, bounded by Camp, Coliseum and Robin streets, in the former suburb Lacourse, as public property, or for the use of the public. The claim is based upon an alleged dedication to public use, by virtue of the original plan under which that part of the suburb was originally laid out and disposed of in lots to different purchasers, which is the same plan adjudicated upon, in the cases of *Xiques et al. v. Bujac*, and *Livaudais v. The Municipality*. There was judgment in the district court against the plaintiff.

On an examination of the original plan, and considering the published prospectus, which preceded the sale and stated the conditions on which the property was offered for sale, we do not find any evidence whatever of the dedication of this space to the public use, or any transfer of ownership, or creation of servitude in relation thereto, by its original owner.

This piece of ground was not enclosed by the municipality, until 1845. Previous to that time, we do not think the evidence established any use or occupation of it, inconsistent or adverse to the civil possession of the owner. We think there is no prescriptive right acquired by the municipality or the public, adverse to the ownership. This ground appears to have been very low and marshy, and inaccessible in wet weather. It was called by the old inhabitants, the Bayou des Armes, and not used until reclaimed in 1845. We do not think the non-payment of taxes for this ground makes, of itself, any difference as to the right of ownership, or proves an abandonment of it to the public use. It is not proved that it was assessed, and may have been omitted on the assessment on account of its condition and little value. Nor do we consider the receipt of taxes on the land since 1849, as in any manner affecting the rights of the municipality. The merits of the case seem to be independent of these facts.

The district judge has, as well as in the case of *Xiques et al.*, given his views at great length and with great care on the different points of fact relied upon by the counsel for the plaintiff. The case does not appear to present any difficult question of law. We think the district judge came to a correct conclusion.

The judgment of the district court, is therefore affirmed, with costs.

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v.  
PALFREY. PRESTON, J., dissenting. All the principles of law and authorities to which I referred in the case of *Annunciation square*, apply to the ground of an irregular figure claimed by the representatives of *Robin Delogny* and *François Livaudais* in this case.

Most of the facts which lead me to conclude that the former was a public place, lead me to the same conclusion as to the place in controversy, to which they are equally applicable.

The place is left white on the plan, and not colored as adjacent squares. It is not divided into lots for sale like all the squares around it. It is not surrounded by a black line of boundary like all the other squares and lots, but is left with the same indicia of dedication as the streets adjoining it, which are not separated from it by any line. It is surrounded by broad canals, collecting the waters of the faubourg into a circular basin in front of it, to be carried off to the rear by the canal *Melpomene*, exhibited on the plan, even at the early day at which it is dated.

There is a large circular *cours* (yard, not a street) connected with it, leading to another oblong *cours*, called *Cours Prytanée*, and which is in front of a square called *Prytanée* evidently intended by the plan, for courts of justice, and by the prospectus to a college. It joins above, a place named on the plan, *Coliseum*, intended for a place of pleasure. The place in controversy, fronts on the *Coliseum* and basin, and is bounded by the canals leading to it, and is open and connected with the *Cours Prytanée*. I have no doubt from the inspection of the plan, that it was dedicated for a public place by the cessation of all use of it as private property for forty years, and its abandonment to the public during that long period, during which they never claimed it, or paid taxes or any dues upon it.

The lots around it were, no doubt, sold for enhanced prices, on account of its supposed dedication, and have been assessed and taxed higher, ever since, on account of the large, open, airy space actually left in front of them, for more than a generation of man. The city filled it up, enclosed and improved it, surrounding it with a chain fence, and with banquets and gutters.

I have no doubt it is a public place, which the ancestors of the ancestors of the claimants in this suit, for ample consideration in the enhanced value of their faubourgs, abandoned in favor of the public forty-five years ago, and that they cannot resume it as private property, without the violation of the rights of surrounding proprietors in particular, and the public in general.

### XIQUES et al. v. BUJAC et al.

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In 1807 *Delogny* and *Livaudais* laid off two tracts of land, within the corporate limits of New Orleans, according to plans on which figured a square designated as "*Place de l'Annonciation*." In the middle of the square there is an "*Islet*," on which is drawn the ground plan of a building, of vast dimensions, marked "*Eglise de l'Annonciation*." The square "*de l'Annonciation*" and the "*Islet*" were, for nearly half a century left in the condition of suburban property—vacant, unoccupied, and abandoned. During this time the original owners, nor their heirs, paid taxes on that property. The heirs of *Delogny* and *Livaudais* attempted to divide and sell the *Islet*. The owners of property who derived title from purchasers under the original plan, brought suit to defeat the action of the heirs, on the ground that the rights of the purchasers were paramount and prescriptive. The controversy involved a consideration of the legal effect resulting from the particular



designation of this Islet on the plan, and the non-user of it by the original proprietors and those claiming under them.\*

The effect of the designation on the plan did not, under the laws of this State, create a dedication to the use of the public, or a servitude in favor of the proprietors. *Eustis, C. J.*

The spot thus designated on the plan for the erection of a church is not a *locus publicus*, but private property. There was no objection on the part of the owners to the erection of the church, and full effect is given to the designation, by considering it a donation in favor of any individuals or congregation which might accept it for that purpose. But if, for nearly half a century it has never been attempted or offered to be done, this right is barred by lapse of time—by the prescription of thirty years. Nor can the owners be compelled to keep the place open for the common use of the purchasers of the property, when the right is thus barred. *Eustis, C. J.*

No dedication to public uses can be inferred from the designation of places of public amusement or of public worship, on the plans of towns and suburbs, as, under the laws of this State, they are invariably private property. *Eustis, C. J.*

By the Spanish law things established for the service of God were held sacred, and the dominion thereof was not in any person. *Eustis, C. J.*

In Louisiana all titles to land were, and remain allodial and not feudal. *Eustis, C. J.*

It is conceded that no particular form of dedication is necessary; but the evidence of the intention to dedicate must be conclusive, and the dedication must be accepted by user or otherwise, in the sense in which it is made; if there was originally a dedication of the land in controversy, which I do not admit, it was a dedication to build a church, which was not accepted in seasonable time for the purpose intended; and the popular conceit, that the land has been acquired to the public by another use not thought of by the grantor, and exercised under the circumstances disclosed by the evidence, is to me an unsatisfactory basis for a judicial action. *Rost, J.*

In relation to public places and streets within this city, the municipal authorities represent not only the corporators but also the public; a final judgment against them is a judgment against the public, and no individual can bring the point adjudicated again before the courts. *Rost, J.*

The servitude of way never extends beyond the breadths of the street adjoining the property entitled to it. *Rost, J.*

It is not necessary for the city to show title to its common and public property. Such property is usually acquired by dedication and the cessation of all claim to it by the former owner. *Preston, J.*, dissenting.

*Delaney and Livaudais* dedicated the whole of Annonciation Place, including the site of the church, to the public use, forever; the whole was accepted the day the first sale was made by their plan; that dedication has been fully proved by their cessation to claim any part of it as private property, and by the public and notorious use of it as public property for forty years before they advertised it for sale. Its destination may be changed by the unlimited sovereign power of the State, but by no other power on earth. *Preston, J.*

When, by natural or other events, a public place cannot be used any longer for the purpose for which it was once destined, and has necessarily lost the legal character which its destination and consequent use had given it—has, perhaps, become a nuisance instead of a public benefit—then the sovereign may change the destination. *Preston, J.*

A judgment against the right of a city to public property, will not bar an individual who was no party to the suit, and who is interested in maintaining the dedication. *Preston, J.*

Where property is sold by a plan, the ideas which it conveys are as binding on the vendors, as the words in a deed of conveyance. *Preston, J.*

The vendors of this property did not bind themselves to build the church on the Islet, but they bound themselves never to build anything else on the ground. *Preston, J.*

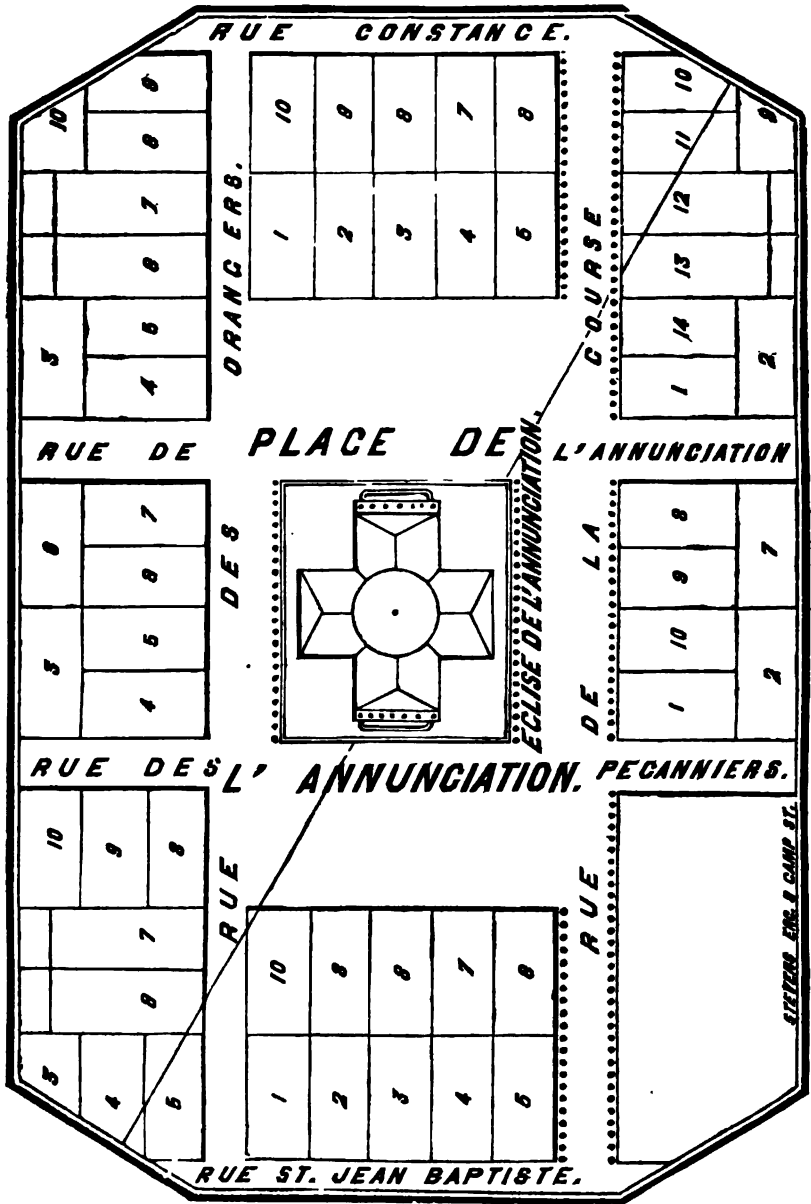
**A** PPEAL from the Third District Court of New Orleans, *Kennedy, J. Randall Hunt and H. H. Strawbridge*, for plaintiffs. *Soulé and Maurian*, for defendants.

\*The above statement of facts is correct as far as it goes, and will render intelligible the points of law decided by the court. But for a thorough comprehension of the whole case, and a proper understanding of the views of the several judges, a detail of facts would be necessary that would occupy entirely too much space for an abstract. This detail will be found in the opinion of the judges, to which the reader is referred.

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The following is a Plan of the property in controversy :



By the court: (*Slidell, J., recused himself.*)

EUGENIS, C. J. The plaintiffs allege that they are owners of certain lots around and fronting the public square, designated as "Place de l'Annonciation," on a certain plan under which the lots in that portion of the First District of the city were laid out and sold; that in the middle of this place is a square or islet bearing the number 34; that on said islet is depicted the ground plan of a building of vast dimensions, having a cupola in the centre and fronts on the respec-

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tive sides, which building is marked on the plan as "Eglise de l'Annonciation," is in the form of a great cross, and occupies the whole of the area except the corners; that by this designation on said plan, the founders of the former suburbs Lacourse and Annunciation, in which this property is all situated, destined and appropriated this islet as the site of a church, and renounced the right of appropriating it to any other purpose. The petition sets forth the right to enforce this destination, by reason of their purchases under the plan, and the abandonment of the space on the part of the original owners; of the possession, by the proprietors of the lots around it for many years, or by the citizens and authorities of the city, with the sanction and approbation of the original owners, &c.

The heirs of *Delogny* and *Livaudais* being about to divide this islet and sell it out in lots, at auction, the plaintiffs instituted this action, in which they ask a decree that their rights of ownership and others, relating to this space, be adjudged to be prescriptive and paramount to any claimed or set up by the defendants; that the defendants be adjudged to have no right, interest or title to the same; or, if they have any, that it be adjudged to be subject to the obligation of erecting the church, or of causing or permitting one to be erected according to the plan. The petition sets forth the ground of the plaintiffs' action with great fulness, and the prayer for relief is ample. The defendants were enjoined from selling the property, until the further order of the court.

The judgment of the district court held the defendants to be the absolute owners of the property, and the plaintiffs have appealed.

The plan under which the plaintiffs' rights are asserted, was before the Supreme Court in the case of *Livaudais v. Municipality No. Two*, 16 L. R. 512. The plaintiffs in that suit recovered from the municipality a square of ground designated on the plan as *Colisée*. The court determined that this designation did not amount to a dedication to public use, or vest the title in the corporation. In the case of *Livaudais v. Municipality No. Two*, 5 Ann. 8, the identical square concerning which the present suit is brought, was the subject of litigation, and the court considered it too clear for argument, that the title did not pass under the dedication described in that plan. We think it decided in both these cases, that no dedication to public uses can be inferred from the designation of places of public amusement or of public worship, on the plans of towns and suburbs, as with us they are invariably private property. In the latter case, the court considered that there was no evidence out of the plan to show any dedication to public use, or an acceptance or any prescriptive right acquired against the present defendants.

We find nothing in the evidence which changes the view we then took of the dedication to public use, either as resulting from the plan itself, the acts of the parties, or the prescriptive right asserted by the present plaintiffs.

If the property in this square was not divested from the original owners, and no dedication to public use has been effected, the inquiry is as to the nature of the right asserted by the present plaintiffs. Is it a right of servitude or a real right? We think neither can be assumed as established in any legal sense. *New Orleans and Carrollton Railroad Company v. Municipality No. Two*, 19 L. R. 62, and *French v. The New Orleans and Carrollton Railroad Company*, 2 Ann. 80. The principles on which these cases were decided, we think, are conclusive against the existence of any real right in favor of the plaintiffs' lots, adversely to that which is the subject of this litigation. The titles or tenures by

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which real property is held with us are defined in the Code, as well as the real rights which can be established in relation to it, and no others can be recognized as attaching themselves forever upon it, without breaking down the distinctive barriers of property, and introducing inextricable confusion in the law regulating it, which, for the wisest purposes, is plain, inartificial and easy to be understood, and apt for every reasonable purpose of use.

In the case of *Livaudais v. The Second Municipality*, which related to the Coliseum Square, an expression fell from the court which appears to embody the views of the plaintiffs in the present case. In *Livaudais'* case the court observes: "There is no evidence of the alleged dedication out of the plan in this case, and none in the plan out of the word Coliseum. In the same plan is marked a *locus publicus* called La Place de l'Annonciation, in the middle of which is a spot designated as a place for a church. If the plaintiff did not, by this designation, contract the obligation of building a church, he certainly renounced the right of appropriating it to any other object." In the latter part of the opinion, we think this expression is somewhat qualified. The court says: "As we have said with regard to the spot designated for a church, the obligation which the plaintiff has contracted, by the use of the word Coliseum, might certainly be discharged by the erection of such an edifice. In the meanwhile he may have lost the right of using the square for any other purpose. As to the erection of the edifice, who has put him *in moré*? If the building is not necessarily to be erected by him, who has offered to erect it? Who has accepted the donation which results from this dedication?" &c.

We do not think, that as a matter of argument, this *obiter dictum* aids the plaintiffs.

The difficulty of stating the distinct legal right claimed by the plaintiffs, is apparent in the written argument of their counsel. Hence, the equity of their case is strongly pressed, and the impression on the part of the plaintiffs, and of those interested, is undoubtedly in favor of the right asserted. This impression seems to be, that if the plan does not require that a church should be erected, it involves an obligation on the part of the original owners, that no other building should be erected on the site designated, which should remain open, to be used by all the purchasers of the lots in common, until reclaimed for its original purpose by proper authority; that this was its destination in reference to the surrounding property, and was one of the inducements held out to purchasers. That the original owners, by this designation, undertook to build the church, is not pretended. The whole amount of the sales of the property would not have paid one-fourth of the expense. They might, as such, have been expected to have built an amphitheatre on the place designated for a coliseum.

The law not considering this spot as a *locus publicus*, under the designation in the plan, and the plan indicating an object exclusively within the dominion of private property, and there being no obligation on the part of the owners to erect the church, full effect is given to this designation, by considering it as a donation for the written purpose, in favor of any individuals or congregation which might accept it for that object. This seems to be the only mode contemplated at the time, in which the erection of the church could be secured eventually, and thus the object of the dedication attained. But this has never been attempted, or offered to be done, nor is it now proposed to be done, after the lapse of half a century. And we think any such right on the part of the purchasers must be held to be barred by lapse of time, by the prescription of thirty years. The

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plaintiffs are not in a situation before the court, in which the right, if any existed, could inure to their benefit. It is difficult to perceive, under this view of the subject, how a right can be inferred in this state of things, to keep this place open, for the common use of the purchasers of the property.

We have considered the acts of the parties concerning the use and possession of this land, in relation to the prescriptive right of the plaintiffs. Previous to the enclosure by a fence, by one of the proprietors of lots fronting on it, some fifteen years since, we do not find the rights of either party affected by anything which transpired in relation to it. It was vacant—that is, not occupied or enclosed, and left in the condition of suburban property laid out in lots, which owners do not feel disposed to incur the expense of enclosing. The non-payment of taxes by the defendants, we think, does not of itself impair their rights: it is not proved that any taxes were assessed on the property.

The district judge has prepared a very elaborate opinion on the case, in which we mainly concur. From the best examination we can give to the subject, we have no doubt whatever as to the effect of the designation on the plan, as not constituting, under our jurisprudence, a dedication to the use of the public, or a servitude in favor of the front proprietors.

In relation to the appeal made to the exercise of the equitable powers of this court in behalf of the plaintiffs, we would observe, that they can only be called forth for the enforcement of clear and well-defined rights. We have very strong doubts whether, *in foro conscientiae*, the case is in their favor. It seems to us clear, that it does not present a claim which a court of justice can legally enforce. Pothier on Obligations, Nos. 1 and 197. *Hugh v. Carrollton R. R. Co.* 6 Ann. 511.

The date of the plan carries it back to a period when the Spanish law was in force, and previous to the abolition of the distinction relating to sacred and religious things, and of their inalienability, by the corporations to which the law recognized them as belonging. Code, 447. Code of 1808, book 2, tit. 1, chapter 1, art. 9.

By the Spanish law, things established for the service of God were held sacred, and the dominion thereof was not in any person, and could not be counted as property. The laws on that subject were borrowed from paganism; but nevertheless, since the solemn consecration of churches and cemeteries was established, immediately on things being consecrated, religion was considered as occupying them, and being irrevocably inseparable from them. The consequences of this principle were regulated by the common law institutes of the law of Spain, book 2, tit. 1, p. 73.

As the Catholic religion was the dominant religion in the city and State at the time of this alleged dedication, the name of the place, and of the church, its form and dimensions, leave no doubt in the mind, that the church for which the spot was designated, was to be of the Catholic faith exclusively. It is not pretended, that any offer has been made to accept this donation, if so it may be called, on the part of any Catholic congregation, or any other. Nor do the plaintiffs even intimate any intention or purpose of appropriating the land to such an use.

I am not aware, that there is anything in this case, which calls for any modification of the general doctrine of the dedication of property to public uses, and as expounded in the decisions of our predecessors, and recognized afterwards by this court. The fullest recent case on this subject, is reported in 8th Ben. Monroe's Reports, p. 233, in which the principles of the doctrine are expounded

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and explained with great ability, by the Court of Appeals of Kentucky. To this doctrine I assent. But the doubt in my mind is, whether this case comes within it, the destination of the land being for a Catholic church; an object which, by an express article of our code, is within the dominion of private property, and not inalienable.

I must add, that the general doctrine laid down in common law courts, has been admitted by our courts, with some modification, resulting from our different system of laws. In Louisiana, all titles to land were, and remain allodial, and not feudal. The feudal law, and its usages, never had a place in this region, under the Spanish government, and the jurisprudence of real property, under the common law, cannot be applicable to land titles in this State.

I should be gratified to be able to defer my humble opinion to any long existing general opinion, in favor of a public right; but the right of a citizen to his property, which the law gives him, is the highest of all public rights, which all men have the deepest interest in vindicating and maintaining.

According to my impressions, the use of this square for the purpose claimed by the defendants, defeats the destination made by the founders of the suburb, instead of giving it effect.

Judgment affirmed, with costs.

PRESTON, J., dissenting. For forty years, a large and beautiful double square in the first district of this city, called Annonciation Place, has been regarded as public property. Annonciation Place is a parallelogram, composed of a square, and the halves of two adjacent squares, between Race and Orange, John the Baptist and Constance streets.

In 1807, *Robin Delogny* and *François Livaudais*, jointly, laid off two small tracts of land within the incorporated limits of the city of New Orleans, into the faubourgs La Course and Annonciation. *Delogny* no doubt was fond of the course. *Livaudais* was agent of the nuns, who owned a small tract adjacent to him. The dividing line between the tracts of *Delogny* and *Livaudais*, run diagonally through the place, which is the subject of this suit. Each contributed half the ground, if it is a public place.

Religion prevailed over racing, and they christened it "Place de l'Annonciation." A smaller parallelogram, in the centre of the large one, is laid off. In it a building is sketched, in the form of a cross, and its destination is evidently designated by the name, "Eglise d'Annonciation," Annonciation church.

The heirs of the founders of the faubourg, claim this smaller parallelogram as their private property, and were about to sell it at public auction, in small lots. The plaintiffs, proprietors of lots fronting on Annonciation Square, have enjoined the sale, alleging that the property is public, and that the sale of it as private property, would be highly prejudicial to their rights.

There has been much controversy about the title to the property. It is admitted, that the title was originally in *Delogny* and *Livaudais*, and then it is contended, on their behalf, that those who dispute their present title, must show a deed and conveyance in writing, and not by parol; and assuming, that if it was conveyed, it was by donation, that the donees must show their formal acceptance.

We deal so much in controversies about title, and at common law about the fee, that it is a kind of dogma with civil lawyers, that real property cannot exist without a title in some one, and with common law lawyers, that the fee of real estate can never be in abeyance, but must always be vested somewhere. They stickle for it so much, that one would think they would rather see land struck

out of existence, than that it should exist without a title, or that the fee should be in abeyance.

Now, if we will look a moment at things, without obscuring our ideas with technical words, we will see many things which belong to nobody, and to which therefore, the terms title or fee are not applicable. The 441st article of our code informs us, that "Things which are common, are those of which the property belongs to nobody in particular, and which all men may freely use, conformably to the use for which nature has intended them, such as air, running water, the sea, and its shores." God has given them to the world, and there can be no acceptance of the donation, except in its grateful use.

So there are things common to a nation, as its navigable rivers, harbors, and highways. Its title is its sword, without any writing or parchment. And these gifts of nature are public things.

Now, things may be made public by man, as well as by nature. Things, says our code, which are for the common use of a city, as streets and public squares, are likewise public things. When they become so, they are out of commerce, to be neither bought nor sold, and the term title is inapplicable to them; there is no fee in them. Those are terms which indicate the right to private property, and its modes and mutations. A city may have private property, as a lot bought by the corporation for taxes. To such property, it must show written title. But to the public and common things of a city, it is not necessary to show title. They are generally obtained by dedication, and the cessation of all claim to them by the former owner. They are accepted, not by an act before a notary public, because, as they belong to everybody, now, and in all time to come, it would be a long acceptance, and would have to be kept open forever. They are accepted by the common use of all persons. As the dedication is intended to be perpetual, all the learning about titles, usufruct, servitudes, *et id omne genus*, ceases to have any application to the subject matter, because all those rights are extinguished as to property out of commerce, and belonging in perpetuity to everybody. Those rights are predicable only of exclusive or partial ownership by individuals or corporations, not of universal use by all men, and forever.

In my opinion, *Livaudais* and *Delogny* dedicated the whole of Annonciation Place, including the site of the church, to the public use forever; that the whole was accepted, the day the first sale was made by their plan, and that the dedication has been fully proved, by their cessation to claim any part of it as private property, and the public and notorious use of it as public property, for forty years before they advertised it for sale in lots. If so, it does not belong to them, nor to the city, nor to individuals, and is not susceptible of private ownership, nor the subject of actions, petitory or possessory. It is the subject of administration and regulation by the city, under its municipal powers. Intrusion upon it, inconsistent with its destination, may be resisted by the city, and by individuals, as will be seen hereafter. Its destination may be changed by the unlimited sovereign power of the State, but by no other power on earth. Until then, it is not susceptible of private ownership or alienation, and is as much out of commerce, as fire, air, water, the rivers, seas, or oceans.

The subject of the dedication of property to public use, has been much discussed, and there seems to be well settled principles with regard to it, both at common, and in the civil law, and they are remarkably accordant. It is a subject upon which the rules must, from the nature of things, be very much the same in all countries, and at all times.

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In the case of *Jarvis v. Dean*, 3 Bingham, 447, Chief Justice Best told the jury, that if they thought a street in the parish of Islington had been used for years, with the assent of the owner of the soil, they might presume a dedication to public use. And the jury found a verdict for the plaintiff, although the street had been used as a public road only four or five years. The verdict was sanctioned, the court saying, the jury were warranted in presuming it was used with the full assent of the owner of the soil.

In the case of *The King v. Lloyd*, 1 Camp. 262, Lord Ellenborough said, if the owner of the soil throws open a passage, and neither marks by any visible destination, that he means to preserve all his rights over it, nor excludes persons from passing through it, by positive prohibition, he shall be presumed to have dedicated it to the public.

In the case of *White v. The City of Cincinnati*, it appeared, that the founders of the city had made a plan, according to which the ground lying between Front street and the river was laid out as a common, for the use and benefit of the town, and no lots were laid out on the land thus dedicated as a common.

The suit was brought for a part of the ground thus laid off, and usually denominated, "the common." The Supreme Court of the United States rejected the claim. They said: "There is no particular form or ceremony necessary, in the dedication of land to public use. All that is required, is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation. The dedication was for the public use and convenience, and accommodation of the inhabitants of Cincinnati, and doubtless, greatly enhanced the value of the private property adjoining the common, and thereby compensated the owners for the land thus thrown out as public grounds. And after being thus set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law precludes the original owner from revoking such dedication. It is a violation of good faith to the public, and to those who have acquired private property, with a view to the enjoyment of the use thus publicly granted." 6 Peters, 438-440.

In *Barclay v. Howell*, the same court applied the same principles to the space left by the proprietor, between Water street and the river, in founding the city of Pittsburg. 6 Peters' Rep. 498.

The same principles were maintained by the Spanish tribunals in Louisiana, before the change of government. *Bertrand Gravier* established the faubourg St. Mary, between the years 1788 and 1795, and sold lots by a plan, exhibiting the present Lafayette Square undivided, and with other indicia of a public square. His successor, *Jean Gravier*, imagining that as no deed had been given for this square, the title had not been transferred, and that it still constituted a part of the estate of *Bertrand*, began to erect buildings upon it. His pretensions were opposed, and by decrees of the Spanish tribunals, it was ordered, that the square should be left free for the public use, and that the buildings he had begun to erect should be demolished. The decrees were afterwards recognized to be valid by the Supreme Court of this State, and a second attempt to convert the public square into private property, was defeated by that tribunal.

The same principles were adopted by the superior court of the Territory, in the case of *Gonzales v. The City of New Orleans*.

The subject of dedications was much discussed, in the case of *Cucullu and De Armas v. The City of New Orleans*. The late Chief Justice Martin laid



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down the true principles, applicable to public places, established by the sovereign, and *a fortiori*, to those established by sovereign individuals. Of public places, he says, the public may claim the use, by exhibiting evidence of its dedication to its profit by the sovereign, without any letters patent, grant or deed. The only evidence exhibited in the case he was discussing, was plans of the city of New Orleans, as founded by the sovereign.

In an opinion of singular learning and ability, he maintained the views of the Supreme Court of the United States, in the case of *The City of Cincinnati v. White*. He repudiated the idea, that the case was decided upon principles peculiar to the common law of England, and showed, that the decision rested upon the broad and general principles of law, mentioned in the *Corpus Juris Civilis*: "*Honeste vivere*, to act honestly; *polliciti servare fidem*, when we have made a promise, to keep it; and the necessary corollary, *turpe est fidem fallere*, it is shameful to disappoint expectations we have authorized." 5 L. R. 170.

It is true, his opinion as to that particular case, was overruled by a majority of the court, yielding to an *ex parte* parchment, signed by the President of the United States; and a private building, erected on the very top of the levee, between the two markets of the first district of the city, remains to this day a palpable monument of their error. The opinion and views of Judge Martin were greatly approved by the Supreme Court of the United States, in the case of *The United States v. The City of New Orleans*, and were, indeed, the basis of their decision in favor of the dedication to public use of all the property in front of the old square of the city.

The French government, which founded the city, left a large space in front, marked quay. The abandonment of it to the public, and especially marking it "quay," made it a public place, no longer susceptible of private ownership, until its destination should be changed by the sovereign. It is true, that when, by natural or other events, the public place cannot be used any longer for the purpose for which it was once destined, and has necessarily lost the legal character which its destination and consequent use had given it, has perhaps become a nuisance, instead of a public benefit, then the sovereign may change the destination. Thus, as mentioned by Judge Martin, the remarkable port of Aigues Mortes, in France, from which St. Louis embarked with the soldiers of the cross for the Holy Land, during the wars of the Crusades, is now at the distance of a league from the sea. The sovereign, no doubt, has alienated the land formed by alluvial deposits, and disposed of the proceeds for the inhabitants, who, by natural events, have lost their port, as is always done on the principles of equity in like cases.

So the city of New Orleans sold a portion of the vacant space in its front, left for a quay, as it could no longer be conveniently used for that purpose. The corporation, indeed, sold it without authority, but subsequently obtained the sanction of the sovereign Legislature to the sales, and to the receipt of the price. To the remainder, as well as to the beautiful square in front of these halls, the church, and municipal buildings, I know of no title but dedication to the public use, and of no written acceptance, but an acceptance far more notorious—that of daily public use.

In the case of *The City of Lafayette v. Holland et al.*, the Supreme Court of the State again recognized fully the principles of dedication, as laid down by the English judges, and the Supreme Court of the United States

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in the case of *White v. The City of Cincinnati*, and under these principles, presumed a dedication of the batture in front of the nun's suburb, and of all the space front of the squares, and lots enclosed by lines, as private property, because the nuns left it open in their plans, and ceased to use it as private property. 18 L. R. 251.

In the celebrated case of *The Second Municipality v. The Orleans Cotton Press*, the judges unanimously recognized these principles of dedication, although the decision was against the dedication claimed in that case, on the question of fact alone. The views of the Supreme Court in the case of *The City of Cincinnati*, and of Judge Martin in the case of *Cuculla* and *De Armas* against this city, were quoted with entire approbation. 18 L. R. 237.

This court, in the case of *The Carrollton Railroad Company v. The Town of Carrollton*, admitted the principle, that no particular form or ceremony is necessary, in the dedication of land to public use, and that all that is required, is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation. The subject under consideration, was a dedication by plans referred to in deeds, not by a deed or grant to the corporation. 3 Ann. 284. I consider the cases of *Arnauld v. Wiltz*, and *Delabigarre v. The Second Municipality*, as involving the same principles. The plaintiffs had abandoned all their particular and exclusive interest in the lands claimed in favor of the common interest of the public, and were not therefore permitted to resume it. It was said it would be unjust to the public, and to those who acquire property in reference to a plan, with a view to the enjoyment of the use thus publicly granted, afterwards to appropriate it to private uses. 4 Ann. 118.

The cases of *Challon v. Pepin*, 13 L. R. 534, and of *Dowlin v. The Nashville Railroad Company*, 5 R. R. 6, proceed upon the same principles.

In the case of *Livaudais v. The Second Municipality*, 16 L. R. 512, in relation to the place marked "Coliseum," on the plan now under consideration, Judge Martin, in rendering the opinion of the court, refers to the place which is the subject of this suit, as follows: "In this same plan, is marked a *locus publicus*, called La Place de l'Annonciation, in the middle of which is a spot, designated as a place for a church. If the plaintiff did not, by this designation, contract the obligation of building a church, he certainly renounced the right of appropriating it to any other object."

Notwithstanding this strong intimation of a total want of right to the property in controversy, the defendants, in 1848, instituted a petitory action against the Second Municipality for the property, and the district court rendered judgment in their favor. The present defendants thereupon treated the place as their private property, and proceeded to offer it for sale in small lots, when they were enjoined by the plaintiffs in this suit.

The judge of the district court has considered the present plaintiffs bound by the decision of this court, in the case of the present defendants against the Second Municipality, in which, in a petitory action, they were decreed to be the owners of the property. It is stated by the court, that the judgment of the district court was affirmed in that case upon bad pleadings, and erroneous admissions. Corporations are generally worse represented in lawsuits, than private individuals. Like minors, they are to be considered in a perpetual state of pupillage, and should not be deprived of great rights, amounting to the alienation of their property, by the errors of their counsel.

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But, it is to be further observed, that the district court, whose judgment was simply affirmed, expressly reserved the rights of the proprietors fronting on Annonciation Square, because they were not in court, and the municipality had no authority to represent them. And the court expressly called upon them to come forward and vindicate their rights. They have done so in this suit; and now it is said, notwithstanding the call, the judge adjudged the matter finally against them in their absence, in a suit to which they were not parties.

The interest of a proprietor fronting on a public square or street is so great and direct, compared with that of citizens more remote, or the interest of the whole city, to maintain a dedication of them, that it appears to me right and proper that they should always be made parties to a suit affecting the dedication; that the city does not represent their great and immediate interest, and that they cannot be bound by a judgment distinctive of the dedication, in a suit to which they were not a party.

I do not therefore consider the plaintiffs bound by the judgment in the suit of the present defendants against the Second Municipality, because they were not parties to the suit; because they had great interests in the matter, and more immediate than those of the Second Municipality, which it could not represent, and finally lose the suit, being badly defended; and because their rights were expressly reserved by the judgment.

What are the rights of these individuals? The defendants are about to sell, for the purpose of private buildings, property which they allege is public and common to all men, and the common use of which is invaluable to them in particular. They may, certainly, prevent the building of what they might destroy if already erected. Now, the 857th article of the Civil Code prescribes: "That works which have been built on public places may be destroyed at the expense of those who claim them, at the instance of the corporation or of any individual of full age, residing in the place. And the owners of these works cannot prevent their being destroyed, under the pretext of any prescription or possession, even immemorial, which he may have had of it, if it be proved that, at the time these works were constructed, the soil on which they were built was public and has not ceased to be so since. The suit is, therefore, properly brought. The plea *res judicata* is not supported, and no prescription can prevail against the public use if the place in controversy is a public place.

It remains to be inquired, whether, according to the principles already stated, *Delogny* and *Livaudais*, in point of fact, dedicated the property in controversy to public use.

Each of the proprietors made, and deposited with a notary public, a prospectus, which contained, as expressed, the obligations to which they submitted for the sale of their lots. By it, all the lots were to be sold, from the Levee to Dryades street, separately or by squares, according to the plan made by Lafon, Surveyor of the county of Orleans, and deposited in the office of Pierre Pedesclaux, Notary Public. The lots around Annonciation Place were sold, and those from which the plaintiffs derive title were sold as fronting on Annonciation Place or the streets adjacent to it, as expressed in the authentic acts of sale.

The plan is thus made a part of the prospectus and deeds of sale. They all form one whole. A plan should be a daguerreotype of the thing itself, a picture of the ground, as if thrown by a camera obscura upon the paper. A plan, like a written document, conveys ideas to the mind, and when those ideas clearly appear on the plan or may reasonably be inferred from it, they are as

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binding on the vendors as the words in the deed of conveyance, when the plan is referred to in the deed. For, though words ordinarily convey our intentions and express our obligations, yet signs may do the same; and, if such signs be spread in unmistakable forms on record, there is no difference in the effect between them and formal words.

The plans are, in fact, the surveys and plats of town property, and govern its sales as much as the surveys and plats of country estates govern their transfers. If, for example, I buy a tract of land by a plat exhibiting a front upon a river, I may go to the river for location and quantity, although the river is not mentioned in the deed. So, if I buy a lot fronting on Annonciation Place, the vendor binds himself, that there is and forever shall remain, so far as depends on him, such a Place.

*Place* is a French word, and means a public place surrounded by buildings, kept open for the embellishment of a city or the convenience of its commerce. Annonciation is a religious term, and refers to the tidings brought by an angel to the Virgin Mary of the incarnation of our Saviour. Annonciation is the name of the place in controversy, and *Place* qualifies it as a public place for the embellishment of the city.

It seems to be admitted, because it cannot be denied, that parts of the large oblong figure on the plan represents ground dedicated to public use, and are, therefore, public things. The contest is as to the small parallelogram in the centre of the large one, and in which the ground plan of a church is represented. The defendants contend, that this figure represents private property; the plaintiffs, that the whole of the large oblong figure partakes of one character and represents an entire thing, dedicated to public use, and thereby destined to the class of public things.

The whole of the large oblong figure is represented on the plan of the Faubourg Lacourse and Annonciation, made in 1807, by *Delogny* and *Liraudais*, as an open space. The ground plan of a church is exhibited in its centre, but the whole oblong figure is represented as one entire thing. It is even composed of one whole and parts of two other squares at each end. The figure further represents an undivided thing. The lines of Pecanier and Annonciation streets, which would otherwise pass through it, are arrested when they arrive at the Place Annonciation. Therefore, no streets can pass through it to divide it into three parts, so as to separate the middle of the oblong figure from the two ends. This alone is conclusive that, as part of the ground is clearly dedicated by the plan to public use, the whole must be; because, by the plan, it is undivided.

There is another circumstance which renders it absolutely certain that the whole ground represented by the large parallelogram, was dedicated to the public use. The small oblong figure intended as the site of a church is in the centre of the large one. The name of the whole, as written on the plan, is "Place de l'Annonciation." If this name was all written at either end of the whole figure, or repeated at both ends, there might be some pretext for saying that the middle figure, and ground represented by it, was left undedicated. But half the name, "Place de," is written at one end of the whole figure, and the other half, "l'Annonciation," at the other end; showing indubitably, that the whole of the large parallelogram partakes of the same character and was laid off for one purpose—the dedication of the whole of it to public use. The church square, which divides the name of the whole, having half of it on one

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side and half on the other, is as much the Place Annonciation as the two small parallelograms on each end of the great one, on each of which half the name of the whole is written, the church location being between the parts of the name. It cannot be said, then, that the ends of the whole partake of a character different from the middle. If a painter had drawn the full likeness of a certain patriot, and, lest the portrait might be mistaken, had written "George," at the head, and "Washington," at the feet, as well might it be pretended that the whole represented, the head and feet of George Washington, and the body of John Adams.

Another fact, palpable on the plan, renders it absolutely certain that the space left for the church never was intended to be, and never can be used as private property. The church figure is bounded on both ends by a space which clearly belongs to Annonciation Place, because, on the plan, Pecanier and Annonciation streets are not continued through so as to pass by its ends. And it is equally manifest, by an inspection of the plan, that the sides of the church figure are not bounded by Race and Orange streets, because they do not extend to them. There is a space of forty-five feet on each side, which clearly belongs to Annonciation Place, and not to the church figure. The founders of the faubourg could never, therefore, have reserved the figure in the interior as private property, because there is no possible access to it by streets. The access over public property could never accommodate private occupants. They want wood, water and provisions, which must be hauled to their premises, and to send away all the offal that accumulates in places used for private dwellings or occupations. This the city, as the administrator of public property, could never permit, over that which was dedicated to public uses of an entirely different character. Gravelled promenades, grassy beds, for juvenile gambols, or gardens, like those of Carrollton and Jackson Square, in which to enjoy, in our sultry climate, refreshing breezes, surrounded by the beauty of our southern shrubbery and the fragrance of its flowers. What could be more loathsome to those delightful, improving and refining pleasure parties, formed of both sexes, on our hot summer evenings, as if fully to repay all our daily toils, while enjoying their cooling lemonades, creams, or fruits, in a parterre of the gardens of Annonciation, than to be disgusted by dirty negroes brawling at their stubborn mules, while trailing their filth carts from the private dwellings in the interior. On the other hand, Christians, saddened by their sins, passing to the church of Annonciation, to which the place was dedicated, relieved by confession and prayer, and repassing, gladdened by the tidings of a Saviour, would give even to pleasure a serious character, edifying and useful to its votaries. If this place is converted to private property, so different from the universal understanding and belief, the city would be justifiable in separating it by a wall from Annonciation Place, surrounding it on all sides, so that it never could be used but for a private prison, accessible to pedestrians alone.

Another circumstance, patent on the plan, is conclusive, that all private ownership in the whole parallelogram was abandoned, and that the whole was dedicated to the public. The dividing line between *Livaudais* and *Delogny* is exhibited as running between the whole extent of their property, except through the whole of Annonciation Place. On both ends the lines are arrested by the oblong figure which is thrown into a common property for the public use. The force of this circumstance will be seen by observing that the side lines of their tracts make acute angles with the bank of the river. And yet they have

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established their squares to be parallel, as far as possible, to the river. From the two causes, the dividing line between them cuts many of the lots into the smallest irregular fractions, and yet each retained his fraction of a lot so divided.

It may be said, as the dividing line between them would have passed diagonally through the church figure and cut it into triangles, by stopping it, they intended, at all events, to make common private property of what was represented by that figure. But private individuals always make common property, of portions respectively owned by them, by an agreement in writing, and in those early times, it was always done by act before a notary, on account of the deficiency of notarial or legal knowledge among individuals.

Another fact apparent on the plan, which is conclusive against the pretensions of the defendants to the property in controversy as their private property, is, that the squares and lots in the faubourgs Annonciation, are painted yellow; those in Lacourse, red; and it is written on the plan, that the parts painted yellow, belong to *Livaudais*, and the parts painted red, to *Deligny*. Now, the whole of Annonciation place, the whole of the streets, the battures which they abandoned to the public, the Cours Prytanée and other places, are all left white, showing that they all partake of the same character; and, that private ownership being abandoned for the common benefit, they were all alike dedicated to the public use.

Again, all the squares around Annonciation place, were divided by the founders of the faubourgs into lots, which are even numbered; indeed, all the most valuable squares on the plan are so divided. This shows a destination of all these squares to be sold in lots, and used as private property. Annonciation place was not so divided. This shows, that it was not destined to be sold, nor reserved for private use; but was dedicated to the public for the common good of all.

All the squares and lots intended for private property, are bounded on the plan by single black lines. No line of boundary is run around Annonciation place. It was left open, therefore, for the use of every body, which constitutes a dedication to the public. The place for the church, is surrounded by three black lines. These were not intended for lines of boundary, or there would have been a single black line, as around all the other squares and lots. They were intended to exhibit the foundation of the church, or some fanciful work around it.

The fact, that parts of two adjacent squares, and the sites of two streets, were taken to form the whole place, proves conclusively to any eye that looks upon it, that the whole was taken and united together, to form one large, beautiful and indivisible public place, for the use, gratification, amusement, pleasures, and also devotions, particularly of the inhabitants of the new faubourgs, and generally, of all others who might sojourn among them.

From all these facts and circumstances, and others of minor importance, I read on the plan of *Livaudais* and *Deligny*, as clearly as if it was written in sunbeams, that they dedicated the whole of Annonciation place to the public, forever, for these and other purposes.

Independently of the plan, the same thing is proved conclusively by their conduct, by that of the city and of the public. On the highest and most beautiful part of the faubourgs Lacourse and Annonciation, and directly on the line between them, there is a large oblong space, embracing the whole of one square, parts of two others, and the sites of two streets, which, from the foundation of

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the faubourgs, until the present time, has been kept open, and surrounded by dwellings and otherwise improved lots on the adjacent squares. For forty years it has been called Annunciation place, which means a public place of that name. For forty years, all thought it a public place; for forty years, all men have used every part of it as a public place. The city, as the guardian and administrator of public things within its limits, has improved it as a public place, have surrounded the whole in one body, by a costly banquette, curb and gutter, enclosed it with a fence, and ornamented it with trees, which were rapidly converting it into a shady grove, *rus in arbo*, until this unfortunate suit. All were proud of their great public and indivisible place.

Public squares are almost essential to the health, convenience, and even prosperity of a great city in a southern latitude, and damp and sultry climate. Therefore, they are laid off on the ground, and abandoned by the founders of the cities, by dedication to the public. Sales are made of the other squares and lots, and possession given with reference to them. The purchasers of lots, especially fronting on such squares, give much higher prices for their lots, under the belief that the public squares are so dedicated. The adjacent lots are intrinsically far more valuable, on account of the incalculable value of the public square to the city in general, and the adjacent proprietors in particular. The founders of these faubourgs, availed themselves of all these considerations, received the advanced prices, resulting from the belief that this and other places were dedicated to the public, and all the general advantages to their other squares of such a dedication.

The founders of the faubourgs, during forty years, never claimed the property, and never used it in any manner. It was not assessed as their property; they paid no taxes, State, parish, or city, upon it. So far as appears, it was never taken into consideration in any of their civil transactions, and they have had many. They abandoned it, and the public used it.

The adjacent proprietors paid higher prices for their lots, under the firm belief that it belonged to the public, and during forty years, have been assessed higher, and paid higher taxes, from the universal belief that it was not private, but public property. That universal belief, so far from being ridiculed as in argument, should have great weight in a doubtful case.

The true principles on this subject, are developed by what occurred with regard to the faubourg Plaisance, in the city of Jefferson. The founder, *Wiltz*, sold out the most valuable part of the property on which it is situated; but in doing so, to insure high prices, dedicated to those who might become vendees, the common right of use of the battures in front, and of all the rear for pasture, without any limitation as to time. The vendors united together, and divided the battures and pastures into lots, for separate, and not common use. The heirs of *Wiltz*, sued for the batture and pasture, on the ground, as in this case, that their vendees had never formally accepted the dedication; that they had abandoned the use for which the property was dedicated, and that their ancestor had never parted with the title to the property, but only the exclusive use. All this was very true, but this court held, that he had abandoned all his exclusive rights to his vendees; and that it was unjust to those who had acquired the property with reference to his plan and dedication, that is, the abandonment of all his rights, to attempt to appropriate it again to himself. The same principle was the true basis of the decision in the case of *Dalabigarre's Heirs v. The Second Municipality*.

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Much has been said in the argument and evidence about the contemplated church, who was to build it, the failure to use the part designated for that purpose, and the effects of the non-user.

In dedicating the square to public uses, the founders of the faubourgs merely abandoned to the public, all right, of every kind, which they might have to it. They did not obligate themselves to build the church, nor to cause the place to be used for that purpose. This may be illustrated by their dedication of another square on their plan for a college. They did not bind themselves to erect the buildings, or to supply them with teachers and scholars. But they gave the right to the vendors of their squares and lots, to do so. And another circumstance in that dedication, will illustrate the present: they limited it to a certain period, if the college was not established within the time, reserving, in that case, the right to resume the square. With regard to the church, they did not limit its establishment to any period, or reserve the right of ever resuming the property, if it was not established at all. The true effect of this dedication, was the abandonment of all their rights of property forever. Judge Martin, in the case of the Coliseum, expressed the true and only view of their position. They did not bind themselves to build the church; but obligated themselves never to build anything else on the ground.

It is true, they might have imposed a limit upon this dedication, for the failure to use it for the purpose intended; but a dedication without express limit, is presumed to be perpetual, especially when made for the purposes of religion or education, the necessity of which exists forever. If, therefore, there be no limit of the dedication, the abandonment is perfect and perpetual.

On the other hand, no obligation was imposed upon the vendees of other lots, or the public, to establish the church. From the nature of the dedication, however, the purchasers of the property included in the plan, and their successors, have, until the particular destination by the dedication is changed by the sovereign State, the right to establish a church upon the ground. In the meantime, the city, as the administrators of the public property and rights, should prevent any other buildings from being erected on the place. But the city might be compelled, at any time, to permit such a church to be erected on the premises, as a majority of the property holders of the faubourgs, between the river and Dryades street, might demand.

It is known, that in early times in Louisiana, the inhabitants settled as near their churches as possible. The enlargement of the public place, so as to enable the inhabitants to establish a church in its centre, was a master-stroke by the founders to augment the sale and price of their lots in the vicinity. At that time, the Spanish laws prevailed in the Territory of Orleans. A thing dedicated to God, fell within the class of things denominated sacred, and could not be alienated. The purchasers were induced, by these considerations, to pay much more for their lots, and the faubourgs filled up with population, thus filling the coffers of the original proprietors of the ground. One great inducement was, that in leaving the vicinity of their ancient cathedral or country churches, the settlers of the faubourgs saw, in their midst, the foundation of a house of God. The distinction between sacred and other things, was, indeed, abolished by the code of 1808, but vested rights could not be. The Catholic religion too, was predominant in the faubourgs at that early period, and the place was probably intended for a cathedral, but no denomination of christians was marked on the plan. A cross was exhibited, which all denominations profess to follow. The



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speculating founders of the faubourgs, thought only of the advantageous sale of their lots, to which freedom of religion was essential, and, therefore, left the place open to the competition of all sects, as a majority might become purchasers. They made their speculation out of a conspicuous cross on their plan, and the purchasers paid higher prices, so far as religion was concerned, because they would be more convenient to a place of public worship, and because, on the sabbath, and even on other days, it would be the resort of the most quiet, well dressed, best behaved and useful people of the faubourgs, and, therefore, peculiarly eligible for the dwellings of families.

I have no doubt the additional aggregate price of the whole sales of the faubourgs, in consequence of the dedication of the whole place, with the compound interest, the interest the purchasers might have made in forty years, would now pay for a dozen such places; and, therefore, that vendors have received, and the vendees paid ample consideration for the whole dedication. And, therefore, that there is not the least foundation for the claim of the defendants to the property, but, that it should be decreed to have been dedicated by their ancestors, more than forty years ago, perpetually to great civil and religious purposes, for ample consideration paid and received by them at the time.

Rost, J.\* In the case of *Livaudais and David v. Municipality No. Two*, 5 Ann. 8, decided before the resignation of Judge King, we were unanimously of opinion, that the plaintiffs had never been divested of their title to the property now in controversy, and in this, we but followed the opinion of our predecessors, in a suit between the same parties referred to, with approbation in the dissenting opinion. 16 L. R. 512.

In the former case, the answer was inartificially drawn, but being of opinion that the defence suggested in argument, could not have been sustained, if made at the proper time, we held, that the municipality had not been injured by the bad pleading of their counsel, as there is no new evidence of a dedication to public use in this transcript. I confess I am quite insensible to the lights which shine so brightly for my brother Preston, and so fully convince him, that our former opinion was wrong, and that the plaintiffs are without title.

I think, with the district judge, that the question of title ought to be considered as closed by the former decision. Having lately had occasion to determine that, in relation to public places and streets within this city, the municipal authorities represent not only the corporators, but also the public, and there being a final judgment against them in this case, and through them against the public and the corporators, I do not perceive how the plaintiffs can again bring the question before the court. I understand the power given to corporators, to sue in such a case, as existing only so long as the municipal government has not exercised it.

My impression is, that there are now no rights, in relation to that property, which the plaintiffs can exercise, unless they be rights of servitude established by contract in favor of their property fronting on Annunciation Square, and in that aspect, the case does not differ from that of *French v. The Carrollton Railroad Company*, 2 Ann. 80, in which we held, that the only servitude that could be claimed with any degree of plausibility, was the servitude of view; but that servitudes of that kind, never extended beyond the breadth of the street adjoining the property entitled to them. The servitude of view in this case, extends to

\*The printer improperly inserted the judgment of Judge Preston before that of Judge Rost. The form "64" having been printed before it was discovered, it was too late for the Reporter to correct it.

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the breadth of what is marked on the plan, as "Place de l'Association," not to the ground reserved for the church, which, be it observed, is painted in the same color, as the squares offered for sale, and not as stated in the dissenting opinion, in the color of the two ends dedicated to public use, as the "Place de l'Association."

On the merits, I fully concur with the opinion of the Chief Justice. There is no very material difference between any of us as to the law of dedication, but we differ on the question of fact, whether the dedication alleged, in this case, has been proved.

It is conceded, that no particular form of dedication is necessary; but the evidence of the intention to dedicate must be conclusive, and the dedication must be accepted by user or otherwise, in the sense in which it is made. If there was originally a dedication of the land in controversy, which I do not admit, it was a dedication to build a church, which was not accepted in seasonable time, for the purpose intended; and the popular conceit, that the land has been acquired to the public by another use, not thought of by the grantor, and exercised under the circumstances disclosed by the evidence, is to me an unsatisfactory basis for a judicial action.

I read so much of the transcript, as I am able to read, somewhat differently from Mr. Justice Preston, as to the meaning which the cross painted on the square, and the other mute signs of which he speaks, convey to his mind. I can only say, that the fabric he rears upon them, is in no sense, matter of record.

None of the numerous decisions which he quotes, conflicts with the view I take of the rights of the parties. The case of *Municipality No. Two v. The Cotton Press*, and the *Town of Carrollton v. The Carrollton Railroad Company*, are in strict conformity with it.

The opinion of Judge Martin, in 16 L. R., the substance of which has been stated by the Chief Justice, conclusively shows, that the question of the limitation of the right of ownership of the plaintiffs, not being necessary to a decision of that case, had not been maturely considered by him. I know no legal grounds upon which that limitation can be put, except those mentioned in the case of *French*, which have already been disposed of. The vague and undefined rights asserted in their behalf, are unknown to the law, whose decision should ever prevail over that of the judge.

*H. H. Strawbridge*, counsel for plaintiffs, for a re-hearing. The majority of the bench, as well as the dissenting judge, have both laid great stress upon the plan; but have given interpretations of its meaning diametrically opposite to each other, and differing upon matters of fact. Both, however, have justly considered, that the intentions of the founders by whom the supposed dedication was made, should carry great weight, and present the most certain basis for a proper construction of the contract. In reference to the most important feature of the now obscure and time-discolored plan, relied upon by both parties, his Honor Judge Rost says: "The ground reserved for the church is painted in the same color as the squares offered for sale." Were this remark accurate, I admit that it would form an argument of the strongest force in favor of the defendants.

The judge has probably been influenced by a plan annexed to an opinion of Judge Buchanan, rendered in a different case, and well calculated to mislead. That plan forms (to the best of my knowledge and recollection) no part of the record, never was filed as such in this suit, was not as such introduced in evidence. It is wholly *ex parte*; and when, during his oral argument, the counsel for the defendants produced and laid it on the judge's desk, he did not previously submit it to his antagonist, who supposed that the document was a clerical copy of Judge Kennedy's opinion, having attached to it, for better illustration, another plan, which was referred to in argument before the lower court. Now, on the plan thus here presented, the quadrangle in contest, and

the squares offered for sale, are painted in the same color, conveying false impressions to the mind.

It is not so on the genuine and original plan of the faubourgs. That plan bears on its right hand corner, at foot, the signature of the founder *Delogny*; and on the left hand corner, at top, that of *Livaudais*, above which may be indistinctly perceived the marks of writing which has been effaced, when or how, it is impossible to say. In the right hand corner, are written these words: "Les parties jaunes appartiennent à *M. Jacques Livaudais*, et les rouges à *M. Robin*."

I have already pointed out, that the division line between *Livaudais'* faubourg, styled Annunciation, and *Robin Delogny's*, styled Lacourse, would run diagonally across and bisect the square. On close examination, it will be perceived, not only that all the squares in faubourg Lacourse are colored by a single faint red line, drawn within a black one, but that the square marked "*Colisée*," and that marked "*Prytanée*," the one situated wholly, the other partially in *Livaudais'* faubourg, are nevertheless tinged with red, *Delogny's* color, indicating them to be his property. A still closer examination will detect in such squares in the faubourg Annunciation as are divided into lots, a faint and faded trace of yellow pencilling within the single black line surrounding each square, yellow being a much more perishable color than red. But the central quadrangle of Annunciation Square, is marked out only by triple plain black lines, shaded by neither red or yellow. This is matter of fact, upon which several gentlemen who have scrutinized the plan, agree with me; and nine men out of ten will, upon inspection, unite in saying, that the quadrangle presents to the eye, no traces of any shading or tint whatever, save the yellowish stain diffused by time, or by the effect of varnish over the entire plan. Moreover, the division line between the faubourgs, defining with great sharpness and precision the lots, and even corners of lots lying within the limits of the respective founders, and cutting directly through other squares and lots all known to be laid off for sale, is continued neither across the square or across its enclosed quadrangle, but stops short on reaching the outer limit of "Place de l'Annunciation," and is prolonged anew on the other side!

Now "*inclusio unius est exclusio alterius*." The statement over the signatures of *Livaudais* and *Delogny*, that their respective colors were intended to designate their respective property, the parts "belonging" to them, implied that the spaces designated by neither color belonged to neither. The fact of the church quadrangle being marked in the very centre of a square confessedly public, strengthens the presumption, that it also was dedicated to public use. The very manner of writing the name "Place de l'Annunciation," the word "Place" on one side of the quadrangle, and "de l'Annunciation" on the other, so as to embrace it, as it were, confirms this idea. The defendants themselves do not contend that the spaces on the side towards Orange and Lacourse streets, form no part of the square proper; yet these spaces are neither lettered or marked at all, save by rows of trees close to the line of the quadrangle, such as are represented as lining the principal streets. They are, however, embraced by the words "Place de l'Annunciation," as clearly as if these words had been repeated *ad nauseam*. I can scarcely conceive a stronger proof of dedication of the whole, the church quadrangle and its enclosing area or square, than this designation, contra-distinguished as it is from those which are expressly colored so as to indicate the property of the founders. It is a declaration, as plain as words could make, that the quadrangle was not to be regarded as their property; and this is fortified by the public, general, and contemporaneous interpretation of the community, as the testimony proves, and by the silent acquiescence of the founders during more than forty years of their lives, passed principally, if not wholly, in New Orleans. The law on this subject, is distinct, that even "when the intent of the parties is doubtful, the construction put upon it, by the manner in which it has been executed by both, or by one with express or implied assent of the other, furnishes a rule for its interpretation." C. C. Art. 1951. And "in a doubtful case, the agreement is interpreted against him who has contracted the obligation." Art. 1952. It is also well settled, that in cases of sales according to a plan, the pictorial and other descriptions, the measurements, &c., of that plan, are to be considered as if recited by the act itself, and even controlling written statements contained in the act. *Suarez v. Duralde*, 1 L. R. 260. *Canal Bank v. Copeland*, 6 L. R. 551. *Milikin v. Minnis*, 12 L. R. 539. *Kirkpatrick v. McMillen*, 14 L. R. 497, &c.

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Be it also remembered, that we are not contending with the original founders, who are dead, and cannot be interrogated as to what was intended by the various portraiture on their plan, but with their successors and representatives, who know nothing more of its meaning than we, and probably less. It should also be borne in mind, that the leading counsel for plaintiffs was sick and absent on the day of trial; and, that the oral argument of his associate was, partly by the anxiety of the court to reach another still more important cause, and partly out of necessary courtesy to the distinguished gentleman who appeared for the defendants, and was on the point of departure, cut short at the very outset. The plan was then taken away to the judge's consultation room, and the counsel for plaintiffs, thus compelled to refer to it from memory alone, labored under great disadvantages, and even fell into the error of stating in his brief, that the streets on the plan were nameless. A case of this kind, cannot properly be argued in writing alone; oral argument is almost indispensable.

The actual loss to front proprietors, by diminution of the value of their property, under this decision, cannot be less than \$50,000. Claims will spring up to almost every public square and common in the city. Suit is already entered for Tivoli Circle in faubourg Delor; and, I believe, for Triton Walk also. I am myself counsel for persons entitled to claim Lafayette Square, by title paramount to *Jean Gravier's*; and, that square, was dedicated, if I do not greatly err, in no other manner than by leaving a blank and nameless space on the original plan of faubourg St. Mary. The central ground of Canal, and probably of Esplanade, Rampart and Basin streets, are exposed to similar pretensions. Many others might be enumerated; and, when we remember the numerous cities and faubourgs laid out in the speculative times of '37, it is difficult to say, how great and injurious will be the influence of this decision, upon the property of individuals and the health and prosperity of New Orleans. It is to be greatly regretted, that such a cause could not be tried before a full bench.

Other reasons might be urged and other views taken, but time presses, and enough, I trust, has been said to induce the court to pause, and ultimately accord a hearing more full than circumstances have hitherto permitted, the time allowed by your honors for argument on both sides being restricted to the narrow limits of less than an hour and a half.

Application for re-hearing refused.

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### STATE OF LOUISIANA v. JAMES S. GREEN et al.

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In an indictment for an assault with *intent to commit* an offence, the same particularity of averment is not necessary, that is required in indictments for the *commission* of an offence.

In the prosecution of two or more, under an indictment, charging an intent to commit murder, it is immaterial which makes the assault, or gives the blow, if it is inflicted with the intent charged: all concurring in that intent, the crime is committed by all.

It is not a sufficient ground for a new trial, that the judge, when the jury returned into court without having agreed on their verdict, instructed them a second time on the evidence, as to matters about which they had made no inquiry, and on the law, as to points on which they had stated neither doubt nor difficulty.

In summing up the testimony in a criminal case, it is legitimate for the judge to present his views of conflicting evidence, and to advert to such collateral circumstances, which are proved, as may have a favorable or unfavorable bearing on the issue.

The Supreme Court disapproved of the district court expressing to the jury the determination to keep it empanelled, until a verdict was found.

**A**PPPEAL from the First District Court of New Orleans. *Larue, J. W. A. Elmore*, for the State. By the court: (*Slidell, J., absent.*)

PRESTON, J. This case having been tried *ex parte*, we have kept it under advisement longer than usual, being unaided by argument or authority, on behalf of the State. From the best examination we have been able to give the case, we have come to the conclusion, that the appeal ought not to prevail.

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The indictment charges that the prisoner, with two other persons, made an assault upon one *Michael Hughes*, and with a dangerous weapon, called a colt, inflicted many blows upon him, with intent to commit the crime of murder. The statute prescribes, that whoever shall assault another, with intent to commit murder, shall, on conviction thereof, be imprisoned at hard labor, not exceeding two years.

A leading ground assigned in arrest of judgment is, "that the indictment is uncertain in this, that it charges an assault or offence committed jointly by three individuals, and with one single weapon, without setting forth which of the individuals used the weapon, or committed the assault with the weapon, with the intent to murder."

In indictments for this offence, the intent forms the gist of the offence, and must be specifically proved. *State v. Bill*, 3 Harrington, 571. In the prosecution of two or more for the offence, it is immaterial which makes the assault, or gives the blow. If it is inflicted with the intent charged, all concurring in that intent, the crime is committed by all. Had all been convicted under the present indictment, because of the guilty intent of all, although the blow was given by but one, the judgment could not have been arrested. Much less can it be arrested, as but one of the accused was found guilty. The jury must have been satisfied that the prisoner they convicted, made the assault and gave the blow with the guilty intent to commit the crime of murder, as they acquitted the others.

It is further to be observed, that the 24th section of the act of 1805, under which the indictment was found, does not require the use of any weapon, but only an assault with a murderous intent. If three set upon one with a murderous intent, and an assault be given in pursuance thereof, it is the act of all, and may well be described as the act of all, the intention of all concurring in the great ingredient of the crime.

Moreover, it is settled by authority, that in an assault with intent to commit an offence, the same particularity of averment is not necessary, as is required in indictments for the commission of the offence itself. And it has been expressly held, that in an indictment for an assault with intent to murder, it is not necessary to state the instrument or means made use of by the assailant, to effectuate the murderous intent, though this would be necessary in a prosecution for murder. *State v. Dent*, 3 Gill and John. Rep. 8. Still we would recommend that in all cases, as in the present, the means used should be accurately stated; but as the intent constitutes the crime, if manifested by an assault, it is immaterial, where it is committed by three persons, which uses the weapon or means manifesting that intent, and therefore it is not necessary to state by which of the three it was used.

A jury having been occupied a whole day on the trial of this case, and kept confined all night in deliberating upon their verdict, were brought into court the next day, and declared their inability to agree. The judge thereupon, without being requested by the jury or counsel, made an elaborate address to the jury, supposed by the counsel of the prisoner to be very hostile to their client, and announced his inflexible determination, that they should be kept together until the prisoner was found guilty, or acquitted. The substance of his address was published in several of the daily gazettes, and is incorporated in a bill of exceptions, and presented as grounds for remanding the case for a new trial, with directions to the judge, to abstain from such remarks to the jury, and not to force a verdict, by keeping the jury together until it is rendered.

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Much complaint has been made, that the judge made these remarks, not at the appropriate time for charging the jury, upon the close of the arguments for and against the prosecution, but after they had been engaged a whole night in deliberation, and also without the request of the jury or counsel. But the same thing was done in the case of *The Commonwealth of Massachusetts* against *Snelling*, 15 Pick Rep. 321. And it was held by the Supreme Court of the State, that where, on the trial of an indictment, the jury returned into court without having agreed, and the judge instructed them a second time on the evidence, as to matters about which they had made no inquiries, and had stated no difficulties or doubts as to the law, this was not a sufficient ground for granting a new trial.

We have carefully examined the reports of the remarks of the judge to the jury, which are made parts of the bill of exceptions. His warm appeals to the jury on the notoriously vicious state of our society, in relation to dangerous assaults and personal violence, were intended to justify the severe course he adopted, of keeping the jury together, until a verdict of conviction or an acquittal was rendered. It afforded powerful reasons for a self-sacrificing and rigorous performance of duty by the jury, as well as by the court. Such remarks are constantly made by judges sitting upon criminal trials, sometimes mildly, sometimes with strong feelings. Although we would recommend mildness in this respect, on all occasions, we cannot say that the judge, in expressing himself strongly on this matter of public interest, though not at issue in the case, committed an error fatal to the verdict and judgment against the prisoner.

We have not been able to approve of the expressed determination of the court to keep the jury empannelled until a verdict was rendered, or the severe rigour sometimes exercised towards disagreeing juries, in this respect. The frequency of their disagreement is undoubtedly a great evil, and perhaps would justify a constitutional or legislative provision for the verdict of a majority. But if juries are honestly unable to agree, they should not be forced, by physical means or suffering, to surrender their judgment in the most serious matters of life. But the course pursued in this respect on criminal trials, has always been regarded as a matter within the discretion of the court, and not as giving rise to an error affecting the results of the trial.

The emphatic expressions of the district judge, concerning the necessity of the finding of a verdict for or against the prisoner, must not be isolated from the charge, of which they are a part, nor separated from the connection in which were used, to wit: a further and more deliberate consideration of the case; for which purpose, the judge thought himself not bound to heed the claims of the jury to be discharged, but to direct them still to be kept in confinement. The bill of exceptions purports to give the charge substantially. The reports of the proceedings extracted from the newspapers cannot be considered as going further; and we are bound to hold the strong language of the judge, as admonitions, to the jurors, of the sacredness and importance of their duties, not as attempting to exercise an undue influence upon their rights as jurors, or their judgments and consciences as men; and we cannot hold that its tendency was to coerce, but to quicken their intelligence, and sense of their obligations to give true deliverance on the evidence before them.

The views of the judge, in commenting upon the testimony, were unfavorable to the prisoner. After carefully perusing his remarks, we are unable to say, that he gave more weight to the testimony against him than it deserved, or that

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he improperly biased the jury. It is urged, that his comments are liable to the animadversions of this court, on the charge of the judge in the case of *The State v. Chandler*, 5 Ann. 490, and that case is relied upon to show, that we should reverse the judgment, on account of the hostile remarks.

In the charge of the court in the case of *Chandler*, the judge used such remarks as these: "I have rarely known a case, in which the crime of murder was more clearly brought home to the prisoner, and I cannot think you can entertain any reasonable doubt of his guilt." We thought such strong convictions of the guilt of the accused, coming with all the weight of authority from the judge in whom they reposed so much confidence, might impair the right of the accused, guaranteed by the Constitution, to a trial by an impartial jury. We think so still, but find nothing in the remarks of the court in this case at all, to compare to what was said in *Chandler's* case. We find no expression of the conviction of the court that the prisoner was guilty, or that the jury could not entertain a doubt of it, and must therefore necessarily find him so. In *Chandler's* case we recognized the right of the court, to express its opinion as to the weight of evidence, and comment upon it as much as deemed necessary for the course of justice. We do not find in this case an expression of opinion by the court, even as to the weight of evidence in relation to the great fact charged, an intent to commit murder. To say the most, we only find strong comments on the evidence, which the court evidently thought the course of justice required.

With regard to the character of the accused, not the offence charged against him, we find these strong expressions, which have been most severely criticised: "It has been proved that *James Green*, one of the prisoners at the bar, is a man who lives by depredations upon the community; that he is a professional thief, and in addition to this, I am satisfied that he is a desperado, whose liberty is inconsistent with safety to society; that he is a man, from whose character it is natural to suppose, when he is dragged before justice, that he will sustain his cause by subornation of perjury."

The judge was summing up and comparing the testimony of six witnesses, who had been examined on the trial, four of whom were called on behalf of the prosecution, and rendered it certain, that a blow of an almost fatal character had been given by the accused to an officer of the police. They were positively contradicted by two witnesses, called on behalf of the accused. The court was led to the conclusion, that the evidence was irreconcilably conflicting, and therefore, on the one side or the other, must be false. He therefore referred to the character of the accused, as he understood the testimony in relation to it, and the motives which might have actuated him, to show the greater probability, in weighing the whole, that his witnesses might have been suborned, or were false, than those on behalf of the State.

In summing up the testimony in a criminal case, it is certainly a legitimate exercise of duty by the court, to present his views of conflicting evidence, and advert to such collateral circumstances which are proved, as may have a favorable or unfavorable bearing upon the principal evidence in the case. We cannot therefore say, that there was any error in the remarks of the judge, in relation to the character of the accused, as having a bearing upon the testimony of his witnesses.

The record shows, that a police officer came near losing his life in the discharge of his public duty; and the state of our society no doubt justified the animadversions of the district judge. And although we would recommend

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patience and mildness in the performance of our judicial duties, however painful or disagreeable the circumstances in which we may be placed, yet we cannot say the occasion did not require the rigor exercised, and apparently strong feelings manifested on this trial.

The judgment of the district court is affirmed, with costs.

DOMINIQUE LANATA v. J. L. GRASS AND E. MASSOU & Co.

In an action against the endorser of a draft, he attempted to prove, that the acceptor did not reside at the place where the draft was presented for payment. The evidence was objected to, because the answer contained no allegation under which it was admissible. Held: It was admissible under the plea, that the draft had not been protested according to law.

**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Z. Latour*, for plaintiff. *Bermudez and Beauregard*, for defendants. By the court: (*Slidell, J.*, absent.)

*Rox, J. E. Massou & Co.* are appellants, from a judgment rendered against them, as endorsers of a draft drawn upon and accepted by *Dupuy and Grass* of this city, and held by the plaintiff.

The defence in the district court was, that the draft had not been protested according to law, so as to make the endorsers liable.

The protest shows, that the notary went to No. 75 Old Levee, as indicated on the draft, in order to demand payment thereof, and found the same shut; and, on inquiry in the neighborhood, the acceptors could not be found, nor any one who would pay the draft. Without any further inquiry, the protest was made.

On the trial of the cause, the defendants offered witnesses to prove, that *Dupuy and Grass* never occupied the house No. 75 on Old Levee street, in order to make out the plea in their answer, that the protest was illegal. The court refused to admit the testimony, on the ground, that the answer contained no allegation under which it was admissible. The defendants took a bill of exceptions.

It not being shown, that the direction on the draft, upon which the notary acted, was given by the acceptors, we are of opinion, that under our liberal system of practice, the evidence was admissible under the plea of the defendants, that the draft had not been protested according to law. If the judge thought the plaintiff was taken by surprise, he might have continued the case to another day, but the evidence should not have been rejected.

It is ordered, that the judgment in this case be reversed, and the case remanded for further proceedings according to law, and in conformity with this opinion; and, that the plaintiff and appellee pay the costs of this appeal.



## JOSIAH NORWOOD v. THOMAS DEVALL.

Article 3485 of the code provides, that if the plaintiff after having made his demand, abandons or discontinues it, the interruption of prescription shall be considered as having never happened. *Held*: The expression abandoned, means an active abandonment, and not such an abandonment as may be implied from the absence or default of the litigant, at the time of the trial.

**A**PPEAL from the District Court of East Baton Rouge, *Robertson, J. C. Ratliff*, for plaintiff. *Elam*, for defendant. By the court:

ROSE, J. This is an action for wages as overseer. The defendant pleaded the prescription of three years as a peremptory exception. The plea was sustained, and the plaintiff has appealed.

More than three years elapsed from the rendition of the service, to the institution of the suit, but the plaintiff alleges, that the prescription was interrupted by an action which he instituted against the defendant in 1848. The fact is not denied in behalf of the defendant, that the suit, after being continued from time to time, was finally dismissed in April, 1850, by the following order: "This case having been regularly assigned for trial for to-day, the same was called for trial. The plaintiff being solemnly called to prosecute his suit, and failing to appear in person or by counsel, wherefore, on motion of *D. D. Avery, Esq.*, of counsel for defendant, it is ordered, adjudged and decreed, that this suit be dismissed at the costs of plaintiff." It is urged, that the default of the plaintiff, was an abandonment of the suit, and that the interruption resulting from the institution of it, should be considered as having never happened.

Article 3485 of the code provides, that if the plaintiff, after having made his demand, abandons or discontinues it, the interruption of prescription shall be considered as having never happened.

We think, the expression abandoned, means an active abandonment, and not such an abandonment as may be implied from the absence or default of the litigant, at the time of the trial. Article 2247 of the Napoleon Code, relied on by the appellee, does not appear, to us, to present an analogous case. Under the law of France, the peremption of a demand takes place when the plaintiff ceases to prosecute it during three years; and, art. 2247, expressly provides, that in cases of peremption, there shall be no interruption of prescription. This case acts upon facts ascertained of record; is express and definite as to time; but if an abandonment may be implied under our law, from the default of the litigant, the question after what time and under what state of facts the presumption may be made, remain uncertain and open to litigation in every case. It seems contrary to principles to base presumptions, *juris et de jure*, upon an ascertained fact and indefinite periods of time, and the practice would tend to introduce confusion and uncertainty in the administration of justice.

An express abandonment does not necessarily mean a discontinuance of the suit. Instead of the abandonment being the peremption of the French Code, we take it to be the desistment, a thing quite distinct from a discontinuance. A party plaintiff may be willing to desist from, or abandon his demand, and may enter into an agreement to that effect; but he may make the abandonment on conditions, not acceptable to the defendant, or the case may be such as he can-

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not abandon without the consent of his adversary. He must in all cases have that consent, before he can abandon an appeal. After the acceptance of the abandonment, the suit still subsists, and if the plaintiff refuses to discontinue it, it can only be dismissed by a judgment of the court upon satisfactory evidence that it has been abandoned, and that the conditions appended to the abandonment, if there are any, have been fulfilled by the party claiming the dismissal. Rogron on article 2247, Napoleon Code, and article 403 civil procédure.

We are of opinion, that the plea of prescription has not been sustained. It is therefore ordered, adjudged and decreed, that the judgment of the court below be reversed, and that the case be remanded for further proceedings according to law; the defendant to pay the costs of this appeal.

### A. G. POWERS v. WILLIAM FLORANCE.

A landlord cannot, in an action against his tenant, seize the property of third persons, on which no storage is due, although it may be found on the leased premises.

The offer to return property of a third person, illegally seized by a landlord in an action against his tenant, does not bar the owner from an action for such damages as he may have sustained in consequence of the illegal seizure.

**A** PPEAL from the Fifth District Court of New Orleans. This case was tried by a jury, before *Buchanan J. J. Ad. Rozier*, for plaintiff. *A. K. Josephs*, for defendant. By the court.

EURIS, G. J. The plaintiff alleges, that in a certain suit instituted by *Florance*, the defendant, against *Mrs. Araline Brooks*, he caused to be seized under a writ of provisional seizure, a certain full length picture of General Taylor and his horse, the same being the work and property of the plaintiff, and caused it to be sold at public auction; that the picture did not belong to said *Mrs. Brooks*, and the defendant had no privilege thereon, &c. The value of the picture is estimated in the petition at one thousand dollars, and the damages sustained by the picture at three hundred dollars. The petition concludes with a prayer for judgment for thirteen hundred dollars.

The answer admits, that the picture was seized and sold as the property of *Mrs. Brooks*, who was the defendant's tenant, it being found on the leased premises, and no claim having been made thereto by any one previous to the sale; and denies all responsibility for damages, which, it is alleged, were the consequences of the plaintiff's own neglect.

The writ directed the seizure of the furniture and property found in the building known as the Armory Hall and auction mart, on Camp street. The return shows the seizure of a Jackson painting, with other movables, and bears date the 12th of May, 1849. The suit was instituted in November, 1849.

The valuable time of no less than three juries has been consumed in this litigation. The first gave the plaintiff a verdict for \$950, which was set aside. The second jury, a verdict of \$1000 damages, which met the same fate. And the third trial, on the 21st of November, 1851, after the jury being kept all night in their room, resulted in a verdict for the defendant. From the judgment rendered on this verdict the plaintiff has appealed.

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FLORANCE.

The last verdict, it is said, was the consequence of the erroneous charge of the judge; but, as the counsel for the plaintiff has requested this court to terminate this suit, it is not necessary to notice the charges, as asked by him, of the district judge, or take cognizance of any of the exceptions taken on the trial.

The rights of the lessor on the effects of the sub-lessee, contained in houses or stores leased, extend to those of persons who have left them there on storage, for such sum as they may owe for storage. For this amount the lessor has not a mere privilege, but a right of pledge, and he may cause the effects on storage to be seized and sold to meet the extent of his right. Heunen's Digest, *verbo* Privilege, iii, 1296 and 1297.

The day before the sale of the picture, the plaintiff filed a third opposition, and asked for the restoration of it, alleging that it had been left in the Hall as one of the decorations on the occasion of the 8th of January ball. This opposition was not served on either the defendant, *Florance*, or the sheriff, until after the sale. It was subsequently discontinued.

It does not appear that anything was due for the storage of the picture at the time of the seizure and sale. The picture was sold at the sheriff's sale, and purchased by the defendant for fifty dollars.

On the 12th of March, 1851, the day of the last trial of the cause, the defendant having transported the picture to the court room, tendered it to the plaintiff, who accepted it in mitigation of damages. Under this state of facts it is urged, that the plaintiff is entitled to the damages he has sustained by the taking and retention of his property, at all events, to nominal damages, as the return of the picture does not cure the original conversion.

In December, 1850, the defendant offered to restore the picture to the plaintiff, but an objection was made to the legality of the mode in which the tender was made; and the plaintiff required the payment of his costs and the delivery of the picture to be made to him in the city, the picture then being with the defendant's brother in the parish of Jefferson.

The rule of law insisted on by the counsel for the plaintiff, we think must govern the case. In forming an estimate of the damages we have been quite at a loss. If we had been satisfied that the acts of the defendant were done under a conscientious but mistaken view of his rights, that circumstance would have had great weight with us in diminishing the amount of damages. But the evidence has not so satisfied us. We do not think, however, that they ought to exceed the sum of two hundred dollars, and assess them at that amount.

It is therefore decreed, that the judgment of the district court be reversed, and that the plaintiff recover from the defendant the sum of two hundred dollars, with interest until paid, and costs in both courts.

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CARLOS GARCIA v. FELIX GARCIA AND DUNLOP MONCURE & COMPANY.

Where the overseer does not take the ordinary course of engaging for a fixed salary, the court should reduce his compensation to the lowest sum, which the evidence will justify. Overseers have a privilege on the crop which they have made for their wages, whether in the hands of the original or of third parties.

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v.  
GARCIA.

The creditor who takes property by an act of antichresis, is bound, unless the contrary be agreed, to pay the taxes as well as the annual charges of the property, which has been given to him in pledge; he is bound to provide for the keeping and useful and necessary repairs of the pledged estate, and also for the maintenance of the slaves.

The agent exceeded the amount which he was authorized to spend for the expenses of a plantation. *Held*: That third persons furnishing necessary supplies, or incurring expenses for the crop, had a privilege on it for payment, notwithstanding there was an antichresis recorded on the property in the parish where it was situated.

It is of the essence of the contract of antichresis as of all contracts of pledge, that the creditors be put in actual possession of the property which it affects.

**A**PPEAL from the District Court of the parish of St. Charles, *Duffel, J. Collins and St. Paul, and Bounney*, for plaintiff. *Benjamin and Micou*, for defendants. By the court:

PRESTON, J. *Felix Garcia* executed an antichresis on two plantations, in favor of *Messrs. Dunlop, Moncure & Co.*, to pay large sums of money due on the same. He was left on the plantations as agent, but limited in his charges and expenses for the same, to \$8000 per annum, and bound to procure his supplies through *Dunlop, Moncure & Co.*

In the management of the plantations, large expenses have been incurred, probably exceeding the limit of \$8000 per annum.

*Garcia* employed his brother, *Carlos Garcia*, as overseer, and on his credit supplies to a considerable amount have been furnished, and expenses incurred, part he has paid, and part remains unpaid.

*Dunlop, Moncure & Co.*, being about to remove the crop, *Carlos Garcia* sequestered it, claiming a privilege upon it for his wages as overseer, and for the supplies and expenses furnished and incurred on his responsibility, the greater part of which he has paid.

His claims are resisted, on the ground, that they are exorbitant, and are not privileges on the crop to which *Dunlop, Moncure & Co.* are entitled by the antichresis; and, further, it is denied that some of the expenses have been incurred or paid.

No express agreement was made as to the wages of the plaintiff as overseer. He claims eighteen hundred dollars per annum as a *quantum meruit*. In cases where the overseer does not take the ordinary course of engaging for a fixed salary, we think courts should reduce the claim to the lowest sum, which the evidence will justify. We do not think the evidence in this case, authorizes an allowance of more than twelve hundred dollars per annum, leaving four hundred dollars due to the plaintiff, eight hundred having been heretofore paid. The claim for the wages, is a privilege upon the crop. Code, art. 3184. And, as it is contended, that the defendants are third persons as to another overseer, *Bertrand*, we have to observe, that the privilege follows the crop into the hands of third persons, as held by this court, in the case of *Welsh v. Barrow*, 3 Ann. 133.

We concur with the district court in his conclusion, that *Dunlop, Moncure & Co.*, did not take actual possession of the property, but that the same remained in the possession of *F. Garcia*, as owner and agent of the defendants. The limitation of his powers as agent, is not brought home with certainty to the plaintiff, or that he exceeded them. That he had a general knowledge that his brother had subjected the plantations and crops to an antichresis, we have no doubt. But then the code itself provides, "That the creditor who holds the property by an act of antichresis, is bound, unless the contrary be agreed, to pay

the taxes as well as the annual crops of the property which has been given to him in pledge, and also to provide for the keeping and useful and necessary repairs of the pledged estate, and also the maintenance of the slaves, saving to himself the right of levying on the fruits and revenues, all the expenses respecting such crops." Article 3144. The claims allowed by the district court, are mostly embraced within these provisions. The defendants are bound, therefore, to pay them out of the proceeds of the crops.

We do not think the record of an act of antichresis in the parish, sufficient to exonerate them from the payment to third persons furnishing necessary supplies or incurring expenses for the crops, because their agent may have exceeded the amount to which they limited themselves by the antichresis. His actual possession of the plantations, the titles to which were also in him, justified third persons in contracting with him without consulting the records or his accounts with his creditors, to know exactly whether he was exceeding the limit as to supplies and expenses to which they had agreed.

There are items in plaintiff's account, allowed and disallowed by the district court, with regard to which I think the evidence is doubtful. But neither party asked for a new trial, in the district court, and it is more probable that we should err in attempting to reform the minutæ of the account, than that the district judge has erred. On the whole, then, we will not attempt it.

The judgment of the district court is reversed as to the amount allowed *Carlos Garcia*, the plaintiff. It is further ordered and decreed, that said plaintiff recover from the said defendants the sum of two thousand eight hundred and seventy-five dollars and eighty-three cents, with legal interest from the judicial demand; and that in all other respects the judgment of the district court be affirmed, with costs in the district court. The plaintiff is condemned to pay the costs of the appeal.

ROST, J. It is of the essence of the contract of antichresis, as of all contracts of pledge, that the creditor be put in actual possession of the property which it affects; and, as *Dunlap, Moncure & Co.* did not take actual possession in this case, but suffered the plantations to remain in possession of their debtor, as owner, and made a contract with him in relation to the supplies they were to furnish, I am of opinion, that they can set up no right under the antichresis, and that they stand in no better situation than their debtor towards the plaintiff.

I concur with Mr. Justice Preston, that the overseer's wages and the plantation supplies should be paid out of the crops; and that, with the exception of the wages, which he properly reduces, the judgment of the district court ought to remain undisturbed.

EUSTIS, C. J., concurred with Mr. Justice Rost.



**CASES**  
**ARGUED AND DETERMINED**  
 IN THE  
**SUPREME COURT OF LOUISIANA,**  
 AT  
**ALEXANDRIA,**  
 IN  
**SEPTEMBER, 1852.**

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JUDGES PRESENT.*

Hon. PIERRE ADOLPHE ROST, }
 Hon. THOMAS SLIDELL, }
 Hon. WILLIAM DUNBAR,† } *Associate Justices.*

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**C. H. BLANCHARD v. HEIRS OF AMY BLANCHARD.**

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A motion to dismiss an appeal, on the ground that a judgment ordering a partition in kind is an interlocutory decree, will not be maintained. *By the Court:* We understand this to be a contestation as to the manner of effecting a partition; and that, as such, it must be determined by the court, before proceeding further, under a provision of the code. Art. 1270. If the appellants had gone on with the partition and executed the decree by drawing lots, they could no longer be relieved by it.

It is not enough for the experts to state, generally, that in their opinion the land can be divided in kind; they must point out the manner in which the division is to be made, show the value of the land and buildings, and their nature, and state all the facts upon which their opinion is based.

**A**PPEAL from the District Court of the Parish of Rapides, *Cushman, J. Elgee and Hyams*, for plaintiff. *Flint*, for defendants. By the court:

ROST, J. The plaintiff, who is one of the heirs of the late *Amy Blanchard*, sued for a partition of the lands and slaves belonging to her succession; and, on his motion, *Matthew J. Jones* and *John KeNey* were appointed experts to determine whether or not the property, belonging to the succession, could be divided in kind.

The experts reported as follows: "We report that the property of *Mrs. Amy Blanchard* can be divided in kind, without injury to the owners thereof."

The plaintiff and his brother, *Edward O. Blanchard*, opposed the homologation of the report; and, on the trial of this opposition, a great deal of testimony was offered by them, for the purpose of showing that the property could not be

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\*EUSTIS, C. J., was absent during this term.

†Appointed to fill the vacancy occasioned by the death of Judge PARSONS.

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v.  
HEIRS OF  
BLANCHARD.

divided in kind, without inconvenience and serious injury to all or some of the heirs. The district judge overruled the opposition, and homologated the report. The parties making the opposition have appealed.

A motion has been made for the dismissal of the appeal, on the ground, that the judgment ordering a partition in kind, is an interlocutory decree, from which no appeal lies at this stage of the proceeding.

We understand this to be a contestation on the manner of effecting a partition; and that, as such, it must be determined by the court, before proceeding further, under a provision of the code. Art. 1270. If the appellants had gone on with the partition and executed the decree by drawing lots, they could no longer be relieved against it.

The evidence in this, as in all cases of the same description, consists of probable estimates, and is, as such, quite unsatisfactory. The law, in providing for the appointment of experts, has adopted the best means to give to those estimates the weight, which they have not when obtained from witnesses called up at the moment of the trial.

Correct information under the oath of the experts, of the value of the land, independently of the buildings, of the number, nature, and value of these buildings respectively, would much assist us in determining whether the situation of the buildings and improvements were an obstacle to a division in kind.

It is not enough for the experts to state generally, that, in their opinion, the land can be divided in kind. They must point out the manner in which the division is to be made, show the value of the land and buildings, and their nature, and state all the facts upon which their opinion is based. 2 N. S. 1.

The experts were examined as witnesses, but their testimony shows, that they have not made, together, an appraisement of the land and buildings, and that their examination of the premises has not been as minute as it should have been. It also leaves on our minds a doubt, whether they correctly understood the law under which they acted. They seem to say, that there would be a diminution of value upon the two outside lots, by reason of all the improvements being upon the middle lot, but that it might be compensated in the partition of the slaves and teams. If there was a loss, it was not susceptible of compensation.

The report of the experts in relation to the facts sworn to by the witnesses, would be the best evidence the nature of the case admits of, and for the purpose of obtaining that evidence, we have come to the conclusion to remand the case.

Another consideration has not been without weight with us. The plaintiff is the tutor of the minor heirs. The under-tutor, who was to represent them in this litigation, tendered his resignation to the judge before the citation was served upon him, and he does not appear to have taken any part in it. Judgment was rendered against him by default, and the proceedings went on for twelve months before the judge acted on his application and refused to receive his resignation. On the remanding of the case, he will, no doubt, take such steps as may be necessary to protect the rights of the minors.

It is ordered, that the judgment in this case be reversed; the report of the experts set aside, and the case remanded for further proceedings, with directions to the district judge, to order another report by the experts in conformity with the views expressed in this opinion. It is further ordered, that the appellees pay the costs of this appeal.



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| 7   | 531  |
| 116 | 532  |

## STATE OF LOUISIANA v. SAMUEL WHITE AND ISAAC CLIFT.

In cases of felony, where several are present, aiding and abetting, they may be joined with the principal in the first degree, and charged in the indictment, either as actual perpetrators, or as aiders and abettors.

When the principal in the second degree is charged as an aider or abettor, it is not necessary to set forth in the indictment the means or manner by which he became thus guilty, but merely to describe him generally as being present, aiding and abetting at the felony and murder, (as the case may be,) committed in manner and form aforesaid.

If a person be *present*, aiding and abetting, he cannot be indicted as an accessory.

Three requisites must combine to make an aider and abettor a principal: he must be *present*, *aiding and assisting*, with a felonious intention, to the felony.

This court cannot, upon an appeal, re-examine the decision of a district judge upon a question of fact, such as whether due diligence has been used to procure the attendance of a witness.

Where an inferior court, in a capital case, had refused a continuance, though the defendant offered affidavits, setting forth the fact of the materiality of absent witnesses, and of due diligence in procuring them, there was no error, the court below believing the application to be simply an artifice to obtain delay.

When some of the jurors on the list with which defendant is served, are absent or excused, and the regular panel is exhausted, talismen must be summoned.

**A** PPEAL from the District Court of the Parish of Natchitoches. This case was tried by a jury before *Bullard, J. Elam and Hamilton*, for prisoner. *Welch*, District Attorney, for the State. By the court:

The defendant *Isaac Clift* was indicted in the second count of an indictment against him and *Samuel White*, for robbery, in the following words: "And the jurors aforesaid, upon their oaths aforesaid, do further present, that *Isaac Clift*, late of the parish aforesaid, laborer, on the day and year aforesaid, with force and arms, at the parish aforesaid, in the district and State aforesaid, feloniously was present, aiding, abetting and assisting the said *Samuel White*, the felony and robbery aforesaid to do and commit, contrary to the form of the statute of the State of Louisiana, in such case made and provided," &c. Upon this indictment the defendant was found guilty by a jury, in manner and form as charged in the bill of indictment, and the district judge sentenced him to ten years' imprisonment in the State penitentiary. From this judgment an appeal has been taken to this court upon various grounds, as set forth in bills of exceptions, motions in arrest of judgment, and for a new trial.

The defendant based his motion in arrest of judgment, upon the ground that the before recited count in the indictment was defective, because it did not state in general terms, that he, the defendant, was guilty of the crime of robbery, but only charged him as an aider and abettor to the other defendant, *Samuel White*, and that there is no statute in this State to punish aiders and abettors to the crime of robbery. There is a statute of 1818, p. 168, sec. 8, punishing all accessories to any crime, both before and after the fact. See Revised Statutes, p. 206. But that is no matter of importance in the present inquiry. It is not pretended that there is any defect in the first count of the indictment for robbery committed by *Samuel White*. In cases of felony, where several are present aiding and abetting, they may be joined with the principal in the first degree, and charged in the indictment, either as actual perpetrators, or as aiders

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WHITE.

and abettors. Where the principal in the second degree is charged as an aider or abettor, it is not necessary to set forth in the indictment the means or manner by which he became thus guilty, but merely to describe him generally as being present, aiding and abetting at the felony and murder, (as the case may be) committed in manner and form aforesaid. If a person be present, and aiding and abetting, he cannot be indicted as an accessory. Chitty's Criminal Law, 262-269. Three requisites must combine to make an aider and abettor a principal. He must be present, aiding and assisting, with a felonious intention, to the felony. Ib. 256. The defendant, *Isaac Clift*, has then been indicted, according to the most approved forms and authorities, as a principal, being present, aiding and abetting, with a felonious intention. He is then brought under the provisions of the act of 1805, p. 426, sec. 4, against robbery, and subjected to imprisonment at hard labor, not less than seven, nor more than fourteen years. Revised Statutes, p. 188.

The next objection urged by defendant, appears in his bill of exceptions to the decision of the district judge refusing him a continuance. The reasons given by the district judge, satisfy us that a continuance was properly refused. We have heretofore decided, that this court could not, upon an appeal, re-examine the decision of a district judge upon a question of fact, such as, whether due diligence has been used to procure the attendance of a witness. *State v. Brette*, 6 Ann. 653. The district judge states, that in his opinion, there were suspicious circumstances (which he relates) going to show, that the application was made for delay. It has been decided, that where an inferior court, in a capital case, had refused a continuance, though the defendant offered affidavits setting forth the fact of the materiality of absent witnesses, and of due diligence in procuring them, there was no error, the court below believing the application to be simply an artifice to obtain delay. Wharton's American Criminal Law, 597, 598.

The next objection urged on the part of the defendant, is contained in another bill of exceptions to the opinion of the district judge refusing to sustain his challenge to the jurors presented to him, because all of the jurors comprising the list that had been served on him were not present, some of them having been excused from attendance by the court. To which the judge says, in the bill of exceptions, that the jurors had either been excused for good and legal cause, or were absent without leave of the court. Under these circumstances, when no more jurors could be obtained from the regular panel or list of jurors that had been served on the defendant, the court ordered talismen to be summoned. There was no error in this.

Next and last, the defendant moves for a new trial, which was overruled.

This court has decided, that the exercise of the discretion of the district judge in the refusal of a new trial in a criminal case, cannot be revised upon a writ of error. *State v. Gormer*, 6 Ann. 311.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

## J. D. CHRISTIAN v. MICHAEL WELCH. R. H. CHRISTIAN called in Warranty.

A minor who is a party to a fraud, stands on no better footing than one of full age.

The court will not affirm a judgment in favor of a plaintiff whose case is tainted with fraud.

**A** PPEAL from the District Court of the Parish of Rapides. *Cushman, J. Ogden and Scott, for Christian. Hyams, for defendant. By the court:*

SLIDELL, J. The transcript in this cause reeks with evidence of gross simulations, in fraud of creditors, on the part of the plaintiff, the warrantor, and one of the plaintiff's witnesses. Moreover, portions of the testimony have on their face a marked character of improbability; and the general aspect of the cause, upon a careful consideration, impresses us so strongly against the pretensions of *R. H. Christian*, that we are unwilling to affirm the judgment in his favor. We think there is strong reason to question whether he ever had any real or fair interest in the property in controversy. Where there is fraud, the minors stand on no better footing than one of full age.

The plaintiff acquiesced in the judgment by not appealing, and by asking no amendment here.

It is therefore decreed, that the judgment, so far as it rejects the claim of the plaintiff, *J. D. Christian*, be affirmed, and that the said plaintiff pay the costs of the principal action in the court below, and one-half of the costs of this appeal. It is further decreed, that upon the claim of said *Reuben H. Christian*, there be judgment in favor of the defendant, *George W. Look*, and that the said *Reuben H. Christian* pay one-half of the costs of the appeal, and the costs occasioned by the prosecution of his claim in the court below.

## FORD v. TILDEN.

A judgment was obtained by *Brown* against *Griffin, Cotton, R. A. Hunter, Ford* and *Solihellas*. It was registered thus: "*John Brown v. Spencer Griffin et al., Sixth District Court,*" &c. Held: Such a registry does not operate as a mortgage on *Hunter's* property, because on the face of the inscription, *Hunter's* name does not appear.

If the inscription, which is in the words of the judgment, is on its face insufficient to show the name of the debtor against whom the judgment was rendered, and whose property it was desired to reach, that which the law intended should inform, leaves the reader in ignorance.

The index to the recorder's registry, is no part of the registry, and although *Hunter's* name appears in the index with a reference to the particular inscription in question, yet the error in the registry itself, is not remedied thereby.

**A** PPEAL from the District Court of the Parish of Rapides, *Cushman, J. Flint*, for plaintiff. *Hyams*, for *Tilden*. *O. N. Ogden*, for *R. A. Hunter*, warrantor. *Kelly and Isaacs*, for *Mrs. S. J. Hunter*, warrantor. By the court:

SLIDELL, J. This is an hypothecary action brought against *Tilden* as third possessor. He bought the property at a sheriff's sale made in January, 1849,

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TILDEN.

upon an execution against *Robert A. Hunter*. The plaintiff bases his action upon a judgment obtained in 1840, at the suit of *Brown* against *Griffin* as maker, and *Cotton, R. A. Hunter, Ford* and *Solibellas*, as endorsers of a promissory note; and which judgment, as he alleges, was duly recorded in 1840, and reinscribed in November, 1849.

There are various matters set up in defence, but the only question which we deem it necessary to examine is the sufficiency of the registry.

The judgment was recorded at page 138, in the judgment book kept by the parish judge, in these words: "*John Brown v. Spencer Griffin et al.*, Sixth District Court, parish of Rapides. May term 1840."

"In this case, by reason of the law and the evidence, it is ordered, adjudged and decreed, that the plaintiff recover of the defendants *in solido*, the sum of two thousand one hundred and sixty-two dollars and seventy-six cents, with ten per cent per annum interest thereon, from the 8th February, 1838, and four dollars costs of protest, and the costs of this suit to be taxed. Done in open court, this 23d day of May, 1840. (Signed) GEORGE R. KING, District Judge, 5th Judicial District."

At foot of this entry, in the judgment book, is the following: "A true record, this 11th June, A. D., 1840. GEORGE R. WATERS, Parish Judge."

In the case of *Ade v. Anty*, 5 Ann. 633, we held, that the judicial mortgage exists, and has vitality only by inscription. If there be no inscription there is no judicial mortgage. Has this judgment been inscribed so as to operate a judicial mortgage upon the property then owned by *Hunter*? We think it has not, because on the face of the inscription, *Hunter's* name does not appear. *Spencer Griffin* is the only defendant named in the inscription. Who the other defendants were, does not thereby appear.

It is true, that a person desiring to know who were the other defendants, could have ascertained it, by going to the clerk's office of the district court; and, if he had done so, he would there have found their names, and that *Hunter* was one of them. But this the public were not bound to do. *Jartoux v. Dupeire*, 2 Ann. 608. *Taylor v. Hotchkiss*, 2 Ann. 917. *Hyde v. Benneth*, 2 Ann. 799. The inscription of the judgment should have contained on its face, information, that *Hunter* was one of the defendants, in order to create a judicial mortgage upon his property.

It is said, that this view goes beyond the letter of the law, which directs, that to obtain an inscription of a public act or judgment, the creditor, either in person or by an agent, shall present an authentic copy of the act or judgment to be recorded, to the register of mortgages of the place where the inscription is to be made. C. C. 3330. The plaintiff argues, that he has done this, that he has had the judgment inscribed *verbatim*, and has thus fulfilled what the law required. The article must receive a reasonable construction. If the judgment be on its face insufficient to show the name of the debtor against whom it was rendered, and whose property it is desired to reach, that which the law intended should inform, leaves the reader in ignorance.

It is said, that there was an index to this book alphabetically arranged, in which index, under the letter H, is found this entry, *R. A. Hunter*, administrator *J. Brown*, p. 138; and that by connecting this entry with the inscription, the fact that *Hunter* was one of the defendants, would be ascertained. But this assumes that the index is part of the record, whereas we understand it to be an assistant in searching the record book, and not the record book itself.

We are not aware that we have ever sustained an inscription, which was not in itself substantially complete; and we fear, that if we should depart from a reasonable exactness in such matters, and permit defective inscriptions to be eked out by evidence *aliunde*, the salutary law of registry would soon lapse into uncertainty and confusion.

Judgment affirmed, with costs.

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v.  
TILDEN.

### EXECUTORS OF B. SHIELDS v. ZACHARIAH RICHARDSON.

Suit on a physician's account. Defendant excepted to the petition on the ground that there was no bill of particulars. The exception was overruled. *Held*: That the court erred. Where interrogatories were put to defendant, and from his answers it may be inferred that something is due, but the amount does not appear, and no bill of particulars was filed, as to which the defendant was specifically interrogated, and no explanation offered showing why the bill of particulars was not furnished, the court is without the means of determining how much is due plaintiff, and therefore can give no judgment for him.

**A**PPPEAL from the District Court of the Parish of Rapides, *Cushman, J. M. Ryan*, for plaintiffs. *Hyams*, for defendant. By the court:

DUNBAR, J. This is a suit brought on a medical account, the principal portion of which is one item of three hundred and twenty-seven dollars, as per account rendered, the only other item being a charge of six dollars.

To this demand the defendant pleaded, by way of exception, that no bill of particulars had been filed with the petition of plaintiffs; that he, the defendant, had a right to demand an account, in detail, of the charges against him, and ended with praying that he might not be compelled to answer until a bill of particulars should be filed. This exception was overruled by the district judge. We think there was error in this ruling. *Ledoux v. Goro*, 2 Ann. 395.

The plaintiffs then proceeded to trial upon the answers of the defendant to interrogatories, without any further evidence. There was judgment against him, and he has appealed.

The defendant, in answer to the interrogatories, says: "That he thinks the account is not correct; that he does not know if he owes anything or not, but that he thinks he has paid him, *Dr. Shields*, all that his services were worth." The plaintiffs' counsel however contends, in argument, that if these answers tend to exonerate the defendant, that there is another portion of his answers which fix his liability. The defendant, after stating that *Dr. Shields* had presented his account to him in the spring of 1848, for services rendered up to June, 1847, says: "That he told him there were errors in it which he must correct; he, *Dr. Shields*, did correct one item. He told him there were further and greater errors, which he must correct before he, the defendant, would pay the account. Defendant then thought that the several amounts which he had paid him up to that time, were fully equal to the value of his services."

The counsel of plaintiffs says, that it is plain from the above answers that something is due to his clients, but that something is more than we can divine. Of this it appears to us the plaintiffs have no right to complain. If they had filed a bill of particulars it would have enabled the defendant, in all probability, to point out, in the account, the errors complained of, and in that way alone could

EXECUTORS OF the balance, if any, be ascertained. No excuse has been given, such as the  
SHIELDS loss of the books of the deceased, or any other good reason for failing to file a  
v. bill of particulars. This view of the case makes it unnecessary to decide upon  
RICHARDSON. the plea of prescription.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

### R. WINFIELD v. FRANCIS LITTLE.

Redhibitory suit. Plaintiff was aware of the nature of the disease three weeks after the sale, but no physician was sent for until the day preceding the death of the slave. *Held*: Plaintiff was not entitled to recover.

**A**PPEAL from the District Court of the Parish of Rapides, *Cushman, J. M. Ryan*, for plaintiff. *Hyams*, for defendant. By the court:

ROST, J. The plaintiff seeks to recover from the defendant the price of a female slave, who died about nine months after he had purchased her from said defendant.

The ground of the action is, that before and at the time of the sale, the slave was affected with pulmonary consumption, of which disease she died. There was judgment in favor of the defendant, from which the plaintiff prosecutes the present appeal.

A careful perusal of the record has satisfied us that the judgment must be affirmed.

Physicians introduced by the plaintiff as witnesses say, that the disease, as described in the petition, requires medical treatment from its first appearance: that prompt medical attention ought to be given, and that no recovery is to be expected unless the patient receives medical treatment regularly.

Nine months elapsed between the sale and the death of the slave. The plaintiff has stated that he became aware of the nature of her disease three weeks after the sale, and yet no physician was sent for until the day which preceded her death. Under the settled jurisprudence of this court, this omission would be sufficient to defeat the plaintiff's action, even if the existence of the disease, at the time of sale, had been shown, which is not the case. The symptoms described by the witnesses being those which attend colds as well as diseases of the lungs. *Hiper v. Nuttall*, 1 R. R. 46. *Lyons v. Kenner*, 2 R. R. 53. *Dupre v. Demaret*, 5 Ann. 591. *Dupre v. Prescott*, 5 Ann. 592.

The judgment is affirmed, with costs.

# CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

AT

MONROE,

IN

OCTOBER, 1852.

JUDGES PRESENT.\*

HON. PIERRE ADOLPHE ROST, }  
HON. THOMAS SLIDELL, } *Associate Justices.*  
HON. WILLIAM DUNBAR, }

CANE v. REYNOLDS.

The acknowledgment of a debt, in order to interrupt prescription, must be specific. Loose and vague conversations will not operate an interruption or renunciation.

**A**PPEAL from the District Court of the Parish of Caddo, *Bullard, J. Terrell and Crain*, for plaintiff. *Roysdon and Spofford*, for defendant. By the court:

SLIDELL, J. This suit is brought upon several notes and due bills, all of which matured more than five years before suit brought.

The plaintiff, in argument, seems to concede, that a portion of these claims has been paid, but contends that she is entitled to a judgment for the balance. The defendant urges prescription.

The case turns upon a question of fact, namely, whether the defendant, by acknowledging these claims, has interrupted or renounced prescription.

The jury does not appear to have been satisfied with the testimony adduced on this subject. Some of the witnesses speak of conversations, which we find too loose and vague to operate an interruption or renunciation. See *Conway v. Williams*, 10 L. R. 568.

There is one witness whose testimony is more positive and specific; but it seems to have been disregarded by the jury.

The district judge refused to grant a new trial: from which we infer, that he also was not satisfied with the testimony.

We are not satisfied that the verdict has done injustice.

Judgment affirmed, with costs.

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\*EUSTIS, C. J., was absent during this term.

DWIGHT et al. v. WEBSTER & Co. JOHN BAKER, Garnishee.

A garnishee who is required to answer interrogatories in open court, is entitled to a notice of the order appointing a particular day when his answers are to be made.

The doctrine in *Spears v. Nugent*, 2 Ann. 12, applicable to an ordinary party to a suit, was applied in this case to a garnishee called on to answer in open court.

**A**PPEAL from the District Court of the Parish of Caddo, *Bullard, J. Crain*, for plaintiffs. *Roydson and Spofford*, for defendants. *Land and Cook*, for garnishee. By the court:

SLIDELL, J. The plaintiffs having obtained judgment against the defendants, issued a *fiery facias*, and also filed a petition to make *Baker* a garnishee, under the Act of 1839. The petition contained interrogatories, and the plaintiffs prayed that the garnishee might be ruled to answer them in open court. No order fixing a day at which the garnishee should answer, was obtained at the time. A citation was served on the garnishee, requiring him to answer the petition in ten days after service. This was served on the 21st February, 1851, apparently, during vacation. At the April term following, an order was obtained by the plaintiffs, that the garnishee answer the interrogatories on a day which is left in blank upon the minutes of the court; but which, it is said, was specified in a memorandum kept by the district judge. Waiving the discussion of the omission on the minutes, which, however, it seems to us, are to speak for themselves, and assuming that an order was made specifying the day on which the garnishee should appear in open court to answer the interrogatories, still, we are of opinion, that the garnishee was entitled to notice of the order. In *Spears v. Nugent*, 2 Ann. 12, the court said, when a party requires the answers of his adversary to interrogatories to be given in open court, a day must be appointed to that effect by the judge, by which is understood a day fixed, and of that day the party interrogated must be notified. It is true, the case was of an ordinary party, but the reasons of the rule applies to a garnishee.

In *Parmely v. Bradbury*, it was held, that the law does not require an order of court to the garnishee, directing him to answer the interrogatories; the service of a copy of the petition, containing interrogatories and citation, are sufficient warning for him to answer. 13 L. R. 353. But if the creditor chooses to depart from the ordinary course, and requires the garnishee to answer in open court, an order fixing the day and notice of it, seems to us necessary. If, in this case, the garnishee had filed his answers in the ordinary mode, the plaintiffs might have elected to disregard them, and compel him to answer again in open court.

It is therefore decreed, that the judgment be reversed, and that this case be remanded for further proceedings according to law, with directions to the garnishee, without further notice, to appear in the district court, in open court, on the third Monday of April next, there to answer the interrogatories propounded to him by the plaintiffs, in default whereof, the interrogatories may be taken as confessed. And it is further decreed, that the plaintiffs pay the costs of the appeal.



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| 7   | 588 |
| 110 | 478 |

MALINDA L. SEARS, Administratrix, v. BOYD BEARSH et al.

This suit was brought against the sureties upon an appeal bond. *Per Curiam*: The appeal was dismissed because there was no legal order of appeal, which, in legal intendment, is equivalent to no order at all; and without such an order, the clerk had no authority to take the bond. The maxim, that in whatever manner a man binds himself, he shall remain bound, is not applicable to a case of this kind. \*

The liability of sureties upon judicial bonds, is fixed by the law which authorizes the taking of the bonds.

When the inducement for signing an appeal bond is the supposed existence of an order of appeal, which does not exist, the party signing will be relieved on the ground of error.

**A**PPEAL from the District Court of the Parish of Morehouse, *Sharp, J. McGuire and Ray*, for plaintiff. *Baker and Robertson*, for defendants.  
By the court:

ROST, J. The plaintiff sues the sureties of *John B. Wilson*, on an appeal bond, given by him in a suit of the said plaintiff against *Wilson* and others. The defence is, that the consideration of the bond has failed; that there never was any legal order of court for an appeal of any kind; and if any bond was given, it was null and void for the want of such an order.

There was judgment in favor of the only defendant against whom the case was tried, and the plaintiff has appealed.

When the case in which the bond was given came before the Supreme Court, the plaintiff, by her counsel, moved for the dismissal of the appeal, on the ground that it did not appear on the record, that the appeal was granted on the motion of the appellant in open court, as required by the statute in cases where the appeal is not taken by petition and citation served on the appellee. The motion prevailed, and the appeal was dismissed. 4 Ann. 525.

The appeal was dismissed, because there was no legal order of appeal, which, in legal intendment, is equivalent to no order at all. And without such an order, the clerk had no authority to take the bond. The maxim, that "in whatever manner a man binds himself, he shall remain bound," is not applicable to a case of this kind. It has been repeatedly held, that the liability of sureties on judicial bonds is fixed by the law which authorizes the taking of the bonds; and, as no law authorized the taking of this bond, without a previous order of appeal being obtained, it must remain operative. *Slocumb v. Robert*, 16 L. R. 174. *Welsh v. Thorne*, Ib. 196. *Boswell v. Lynhart*, 2 L. R. 398. *Bach v. Morrison*, 4 Ann. 373.

It is true, moreover, as argued by the defendant's counsel, that the inducement of the defendant for signing the bond, was the supposed existence of an order of appeal, and that the error under which he labored would alone entitle him to relief. C. C. 1890.

It is said, that under the view which we take of the law, debtors, by obtaining informal orders of appeal, may delay the pursuit of their creditors without endangering their sureties. The order of appeal is under the direction of the judge, and it is not to be presumed that he will connive with litigants to frustrate the ends of justice.

The judgment is affirmed, with costs.

## GANDY v. TAINTOR AND WIFE.

The Supreme Court seldom interferes with verdicts on questions of fact.

**A**PPEAL from the District Court of the Parish of Caddo, *Bullard, J. Terrell and Hodge*, for plaintiff. *Crain*, for defendants. By the court:

**Rost, J.** This case is not in a condition to be finally closed.

We seldom interfere with verdicts on questions of fact, but in the present instance we have no means of ascertaining whether the jury acted upon the facts of the case, and came to the conclusion that the defendants had not taken proper care of the slave *Sarah*, during her last illness; or whether they considered that taking the slave with them, on a visit to a friends house, eight miles from the place where she was hired, was such a breach of their contract with the plaintiff, as rendered the husband liable, under all circumstances, for the loss of the slave, which occurred during that visit.

On the first hypothesis, the evidence of culpable neglect is far from being satisfactory. On the second the finding of the jury is manifestly erroneous. There was no agreement that the defendants should never take the slave out of the corporate limits of the town of Shreveport; and as she was hired to nurse their infant child, they had the right to put her to the ordinary uses of a nurse, and to take her with them in their occasional visits to their neighbors.

The district judge having refused to grant a new trial, we will, in deference to his opinion, remand the case.

It is ordered that the judgment in this case be reversed, and the case remanded for further proceedings, according to law; the plaintiff and appellee paying the costs of this appeal.

## STATE OF LOUISIANA v. JORDAN LEWIS.

The act of March 11th, 1837, which points out the manner of proceeding against the parties to bail bonds in criminal cases, assumes that the bond is authentic, and thereby dispenses with proof of its execution.

The act itself directs judgment to be entered against the parties to such bonds *in solido*. Where the sheriff's certificate is silent as to the date when he received and accepted the bail bond given under this act, it will be presumed that such acceptance was after he had been authorized to do so by the committing magistrate.

**A**PPEAL from the District Court of the Parish of Caddo, *Jones, J. Morrison*, District Attorney, for the State. *Royson and Spofford*, and *Buckner*, for defendant. By the court:

**Rost, J.** The appellants became the sureties of *Jordan Lewis*, on a bail bond given by him, to answer for a charge of larceny. He failed to appear in court when called, and judgment was rendered against him and his sureties *in solido*, on motion of the attorney representing the State, as authorized by the act of 1837. The sureties have appealed, and allege the following grounds of

error: 1st. That there is no legal evidence of the execution of the bond. 2d. That the bond is a joint obligation, and not an obligation *in solido*. 3d. That the bond was taken by the sheriff without previous authority from the committing magistrate, or any other competent officer, and is therefore null and void.

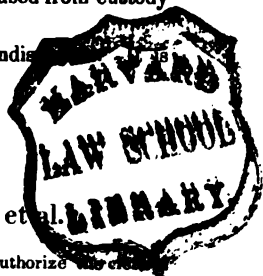
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The two first grounds of error may be answered by a simple reference to the act of 1837, under which the bond was taken and the proceedings had in the court below. It provides that, on the failure of the sureties to produce, instantler, in open court, the person of the defendant, when called upon to do so, on motion of the attorney representing the State, the court shall forthwith enter up judgment against the principal and securities *in solido*, for the full amount of the bond."

This law evidently assumes that the bond is authentic, and orders judgment to be entered upon it forthwith. The authenticity of judicial bonds, after they are filed in court, had been previously recognized by the Supreme Court. See 10 M. R. 180 and 197. The bond proved itself, and the law, under which it was taken, fixes the nature of the liability of the sureties towards the State, by ordering judgment to be entered against them *in solido*. *Slocmoh v. Robert*, 6 L. R. 174.

On the 17th October, the committing magistrate authorized the sheriff to bail the accused, who was then in custody, upon his giving bond and security in the sum of \$350. And on the same day the sheriff certifies that the accused, having given bond, was released from custody. The bond taken bears date the 14th October, 1851. There is, on the back of it, a certificate of the sheriff that the bond had been accepted and received by him. This is immediately followed by the approval of the bond, signed by the committing magistrate, which bears date the 17th October, 1851. The certificate of the sheriff is without date, and we are bound to presume that he received and accepted the bond after he had been authorized by the committing magistrate to do so. In accordance with that presumption, it is shown that he did not release the accused from custody till after that time.

We are of opinion, that the judgment must remain undisturbed, and we have ordered that the judgment be affirmed.



### MABURY WAFER v. ALEXANDER WAFER et al.

The Act of the 18th of March, 1850, does not require that the oath to authorize the execution of the judgment, destroyed by the burning of the court house of Claiborne, should be made by the owner of such judgment, and by no other person. It requires a statement, under oath, specifying the exact amount of such judgment or the balance due thereon, without saying by whom the oath shall be made.

The attorney who has obtained the judgment, and who has kept a memorandum of it, is a proper person to make the affidavit.

Errors and irregularities in the proceedings and sale by a sheriff, under execution, are cured by the giving of a twelve months' bond.

The proviso in the Act of the 18th of March, 1850, "That the person against whom such execution may be issued, shall have the right to enjoin the same, upon making oath that any material statement in the affidavit of the person applying for the execution is not correct; and if such injunction be set aside, the person enjoining shall not be liable to any damages except the costs of said injunction," is not applicable to an execution upon a twelve months' bond.

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**A** PPEAL from the District Court of the Parish of Claiborne, Bullard, J. Jones, for plaintiff. McGuire and Ray, for defendants. By the court:

DUNBAR, J. This is an injunction, sued out by the plaintiff, to stay an execution issued upon a twelve months' bond, given by the plaintiff, *Mabury Wafer* and his sureties, in the case of *Alexander Wafer v. Mabury Wafer and Sicily Wafer*. It appears, that on the 29th of May, 1850, *John Ray*, in the capacity of attorney for *Alexander Wafer*, made an affidavit in conformity with an Act of the Legislature of Louisiana, of the 18th March, 1850, in which he set forth that *Alexander Wafer*, at the fall term of the district court of the parish of Claiborne, had obtained a judgment against *Mabury Wafer* and *Sicily Wafer* jointly, as the universal heirs and legatees of *Thomas Wafer*, deceased, for the sum of \$751 24, with interest, &c.; that the said judgment, above described, had been destroyed by the burning of the court house of the parish of Claiborne, in November, 1849, and that he made the affidavit from his recollection of the facts and from memorandums taken by him at the time of the trial of the case. Upon this affidavit, under the provisions of the aforesaid Act of the 18th March, 1850, the clerk of the district court issued an execution on said judgment against *Mabury Wafer* and *Sicily Wafer*, under which the sheriff, as is shown by his return, proceeded by levying the same on the plantation on which *Mabury Wafer* resided, who waived notice of levy and the notice to appoint appraisers. At the first exposure, the property seized not bringing two-thirds of its appraised value, the sheriff proceeded to advertise and sell the same at twelve months' credit, when *Mabury Wafer* became the purchaser, executing the twelve months' bond upon which the execution now enjoined has been issued.

The plaintiff alleges in his petition, that there are material errors in the affidavit of *John Ray*, upon which execution was issued against him; that even under the affidavit itself he is only bound for one-half of the aforesaid judgment, and that the said *John Ray*, as the attorney at law of *Alexander Wafer*, was not authorized by the Act of 1850 to make the oath required by that statute, but that it should have been made by *Alexander Wafer*. The plaintiff further alleges that he gave in error the aforesaid twelve months' bond.

We have examined the Act of 1850, and find that it does not require that the oath to authorize the clerk of the parish of Claiborne to issue an execution upon a judgment destroyed by the burning of the court house of Claiborne, should be made by the owner of such judgment and by no other person. On the contrary, it requires "a statement, under oath, specifying the exact amount of such judgment or the balance due thereon," without saying by whom the oath shall be made. In the present instance, we consider that *John Ray*, the attorney who obtained the judgment and who had kept a memorandum of it, was the most proper person to have made the affidavit.

With regard to the errors and irregularities complained of by the plaintiff, in the proceedings and sale by the sheriff, under the execution issued upon the destroyed judgment, we are of opinion, if there were any, they were all cured by his giving the twelve months' bond. *Jones v. Frelsen*, 9 R. R. 185. *Coons, curator v. Graham, curator*, 12 R. R. 209. There is, moreover, evidence in the record, that in the partition of *Thomas Wafer's* estate, it was agreed between *Mabury Wafer* and *Sicily Wafer*, his heirs, to leave \$1650 in the hands of *Mabury Wafer* to pay the debts of the estate of *Thomas Wafer*, for one of which debts the destroyed judgment was rendered. From which it may well

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be inferred that *Mabury Wafer* intended, in the giving of the twelve months' bond, to settle, in full, the whole amount of the judgment against himself and *Sicily Wafer*. There is nothing in the record to satisfy us that there was any error in the affidavit of *John Ray* upon which the execution issued; but the Act of 1850 provides "that the person against whom such execution may be issued, shall have the right to enjoin the same upon making oath that any material statement in the affidavit of the person applying for the execution is not correct; and if said injunction be set aside, the person so enjoining shall not be liable to any damages, except the cost of such injunction." We are of opinion that this proviso is not applicable to the execution on the twelve months' bond.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed; the appellant paying the costs of this appeal.

### JAMES W. QUARLES v. D. L. EVANS.

Previous to the act of March 10th, 1852, our laws expressly prohibited every person from practising the profession of a physician or apothecary, or that of midwifery, without a special license granted by the medical board, or a diploma from the University of Louisiana, and imposed a fine upon all persons so offending, for the benefit of the Charity Hospital.

The act of March 10th, 1852, authorized any person with a diploma from a chartered medical college in the United States, to practice medicine without license, and to charge, demand, and receive fees for visits, &c., and repealed the prohibiting and penal laws not consistent therewith.

The repeal of a penal statute prevents a penalty or fine from being enforced, but does not render a contract made in defiance of law valid, nor does it give any right of recovery on such a contract.

The unrepealed proviso of sec. 4th of the act of the 16th March, 1816, only relieves the person coming within it, from the fine or penalty declared in the act.

**A** PPEAL from the District Court of the Parish of Claiborne, *Bullard, J. Roysdon and Spofford*, for plaintiff.

The plaintiff, a physician, sued the defendant, as universal legatee of *Mrs. Prothro*, deceased, for medical attentions and services rendered her at the instance of defendant. Defendant pleaded, that plaintiff was not duly licensed by a medical board of the State, according to the statutes, and therefore could not recover for services rendered as a physician, in contravention of law.

Plaintiff, in an amended petition, also claimed compensation for medicines furnished, and attentions bestowed in nursing the deceased during her last illness, which was protracted and incurable. To the amended petition, defendant pleaded the prescription of one year. Plaintiff had a verdict and judgment, and the defendant appealed, his motion for a new trial having been overruled.

The plaintiff and appellee respectfully submits the following points and authorities: 1. Pending the suit, and before trial, the act of March 10th, 1852, was passed, authorizing any person with a diploma from a chartered medical college in the United States, to practise medicine without further license, and to charge, demand, and receive the usual fees for visits, medicines, prescriptions and medical services, and repealing the old prohibitory and penal laws, which were not consistent therewith. The disability to charge and collect fees was, in substance and effect, but a part of the penalty of the old laws. The repeal of a penal statute, pending a litigation in which its penalties are invoked, takes from the courts the power of enforcing those penalties. *The State v. Johnson*, 12 L. R. 547. "The reason is, that a legislative pardon is presumed to have been intended." Formerly, the practice of medicine without the license of a medical board, was *matum prohibitum* merely; a party receiving the benefit of services

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rendered in contravention of the laws then in force, was still under a natural obligation to pay for them. C. C. art. 1751, No. 1. The repeal of the prohibitory laws wipes every trace of a misdemeanor from this transaction, and transmutes the natural into a civil obligation. No reason can be given for a different doctrine, unless it be the necessity of punishing an offender, and deterring others from violating any prohibitory law, by enforcing a penal statute even after its repeal, so far as to release a party from a contract made in violation of it before the repeal. This argument would be still more forcible in a criminal case, and would sustain an indictment under a penal statute after its repeal, for an offence against it committed before. But no court of law would listen to such a doctrine. The judge *a quo* charged the jury, that his impression was, that this view of the law was correct; to which charge the defendant took his bill of exceptions. The charge was not sufficiently positive to mislead the jury, even if the judge's impressions were erroneous; and if they were, there are other grounds on which the verdict must be supported.

2. The plaintiff committed no violation, even of the repealed laws. The act of March 16th, 1816, (Bul. and Cur. p. 671,) in its title and through all its sections, uses the terms, "practise physic, or the profession of an apothecary," but upon those who shall "practice the profession of a physician, an apothecary, or that of midwifery." Why this change of phraseology? It was manifestly the design of the Legislature in the latter enactment, to punish him only, who, without a license, followed the profession of a physician as a continuous pursuit, and held himself out to the world as such, not to visit with its penalties him who turned aside from another calling to prescribe for a single family, who, as in this instance, would have his services. It is in evidence that the plaintiff, at the time he rendered these services, did not follow the calling of a physician, but that of a planter, and that he only yielded to the urgent request of the present defendant, to attend his deceased connection in her illness, after having consulted him as an attorney at law, about the propriety of doing so without a license. Furthermore, it is submitted, that the plaintiff comes within the unrepealed proviso of sec. 4th of the act, 16th March, 1816, which exempts from penalties "a planter in the country, who, on the application of any of his sick neighbors, should procure them some alleviation, or administer them any kind of physic." The acts of 1816 and 1840, being penal statutes, must be strictly construed. 1 Blackstone, 88. If the evidence is insufficient to convict the plaintiff under an indictment, he cannot be deemed to have violated the law, so as to defeat his action.

3. He is clearly entitled to recover, under his amended petition, for medicines furnished, and services rendered in nursing the deceased testator, and alleviating her sufferings whilst laboring under the palsy, which terminated her life. The testimony of *Dr. McFarland*, as to the value of such services, would justify the verdict. This claim is not barred by the prescription of one year. *Gallaspie v. Livingston*, 5 Ann. 671.

4. Finally, if, upon a view of the whole case, there be any doubt upon the mind of the court, the plaintiff, in this instance, is entitled to the benefit of it. When the facts of a case present a double aspect, one of which displays a contract authorized by law, and the other one which the law reprobates, the contract must be sustained. *Succession of Bushrod Jenkins*, 5 Ann. 682. *Bank of Louisiana v. Briscoe*, 3 Ann. 157.

*Jones*, for defendant.

By the court:

DUNBAR, J. The plaintiff, a physician, sued the defendant as universal legatee of *Mrs Prothro*, deceased, for medical attentions and services rendered her during her last illness, and by an amended petition, claimed compensation for medicines furnished, and attentions bestowed in nursing the deceased during her last illness, which he says was protracted and incurable.

Defendant pleaded, that plaintiff was not duly licensed by a medical board of the State, in conformity to law, and could not recover for services rendered as a physician, in contravention of law. 2

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There was a verdict and judgment for the plaintiff, and the defendant has appealed.

Our laws expressly prohibited every person from practising the profession of a physician, an apothecary, or that of midwifery, without a special license granted by the medical board, or a diploma from the University of Louisiana, and imposed a fine upon all persons so offending, for the benefit of the Charity Hospital. It is true, that subsequent to the services rendered by the plaintiff as a physician, and during the pendency of this suit, the Act of March 10th, 1852, has been passed, authorizing any person with a diploma from a Chartered Medical College in the United States, to practice medicine without license, and to charge, demand and receive the usual fees for visits, &c., and repealing the penal laws not consistent therewith. From whence, it is argued by plaintiff's counsel, that the repeal of penal statutes pending a litigation in which its penalties are invoked, taking from the courts the power of enforcing those penalties, confers on the plaintiff the right to recover for services that were illegally rendered before the repeal of the statutes. This we think by no means follows. The repeal of a penal statute prevents a penalty or fine from being enforced, but does not render a contract, made in defiance of law, valid, nor does it give any right of recovery on such a contract.

It is next argued, that the plaintiff comes within the unrepealed proviso of sec. 4th of the act of the 16th March, 1816, which exempts from penalties "a planter in the country, who, on the application of any of his sick neighbors, should procure them some alleviation, or administer them any kind of physic." The same answer may be given to this, as to the former proposition. It only relieves him from the fine or penalty.

The plaintiff's counsel further contends, that the plaintiff is entitled to recover under his amended petition, for medicines furnished and services rendered in nursing the deceased.

We consider this a mere shift or device on the part of the plaintiff, with the hope that he might recover as a nurse, for services rendered illegally as a physician.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be reversed, and that there be judgment for the defendant, the plaintiff paying costs in both courts.

### MARY I. DRAKE v. HENRY DRAKE, Administrator et al.

A minor's mortgage, on the property of his tutor, commences from the date of the tutorship.

The omission to insert the date of the mortgage, in the judgment obtained for the minor against his tutor, cannot affect the legal rights of the minor. It is enough that the right of mortgage should be recognized in the judgment.

The date of the mortgage is established by law, and may be proved *aliunde*.

**A**PPEAL from the District Court of the Parish of Bossier, *Jones, J. Lawson and Fuller*, for plaintiff. *Peets*, and *Roysdon and Spofford*, for defendants. By the court:

ROST, J. There is no error in the judgment appealed from.

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v.  
DRAKE.

The minor's mortgage on the property of *Reuben Drake*, relied on by the defendant, commenced from the date of the tutorship in 1836. Although it would have been proper to insert the date of that mortgage in the judgment obtained for the minor against his tutor, the omission cannot affect his legal rights. It is enough that the right of mortgage should be recognized in the judgment. The date of the mortgage is established by law, and may be proved *aliunde*. This date being long anterior to that of the mortgage claimed by the plaintiff on the property of her husband, *Reuben Drake*, and the fund in the hands of the sheriff being insufficient to satisfy the minor's judgment, she has no right to any portion of it.

The judgment is affirmed, with costs.

### HEIRS OF JOSEPH THOMAS v. JOHN M. PHILLIPS.

It would introduce infinite public mischief, were the court to decide that the confirmations by the commissioners and Congress, made expressly to those who claim by derivative title, did not operate to their own use.

If the adjudication by a commissioner in favor of the claimant, duly authorized by Congress to make such a decision, would be final, the court cannot perceive why a decision and confirmation by Congress itself, should not be equally valid and final.

**A**PPEAL from the District Court of the Parish of Catahoula, *Barry, J. McGuire* and *Ray*, for plaintiff. The decisions relied on by the judge, are *Purris v. Harmanson*, 4 Ann. 422. *Lobdell v. Clark*, 4 Ann. 99. *Strother v. Lucas*, 12 Peters, 458. *Le Bois v. Bramell*, 4 Howard, 449.

We contend that this case differed materially from those cited; they were confirmed by acts of Congress, based upon reports of commissioners vested with powers to hear, decide and adjudicate upon the validity of the claims and the transfers thereof. In some of those cases the court gives this as a reason for their decision. The powers vested in those commissioners are to be found in *Land Laws and Opinions*, vol. 1, p. 122, No. 74, s. 5, May 2d, 1605; p. 154, No. 94, s. 4, March 3d, 1807; p. 228, No. 151, s. 3, February 27, 1813; p. 242, No. 162, s. 3, April 12, 1814; p. 247, No. 166, April 18, 1814.

We think the old decisions are correct in relation to this case; that the confirmation inures to the benefit of *Thomas*, unless a transfer to *Henry* is proven. *Thomas v. Tunley*, 3 R. R. 212. *Bradley's Heirs v. Calvit*, 5 M. R. 662. *Sanchez v. Gonzales*, 11 M. R. 207. *Sackett v. Hooper*, 3 L. R. 107. There has not been any evidence offered either in court or in the Land Office, of any transfer to *Henry*, or any occupancy by him.

The deed from *Turnley* and *Wallon* to *Philips*, subrogated him to their rights of warranty on *Mrs. M'Cluer*. The deed from *Mrs. M'Cluer* to them was a private sale of property, belonging to an estate in which minors were interested, is a nullity, and not a sufficient basis for prescription without actual possession over thirty years. It is a nullity. *Francoise v. Delaronde*, 8 M. R. 629. *Green v. Hudson*, 7 L. R. 123. *Huey v. Barrow*, 4 Ann. 252. *Reeves v. Towles*, 10 L. R. 283. *Smith v. Corcoran*, 7 L. R. 49. C. C. 3449 to 3453, 3414. *Balot v. Morina*, 12 R. R. 559. *Bradford v. Cook*, 4 Ann. 231. *Williams v. Booker*, 12 R. R. 257. *M'Clusky v. Webb*, 4 R. R. 204. Actual possession is necessary to commence a prescription upon.

*Mayo* and *Curry*, for warrantors. *Phelps*, for defendant.

By the court:

**DUNBAR, J.** This is a petitory action, to recover a tract of land lying on Black river, in the Parish of Catahoula, containing six hundred and forty acres.



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PHILLIPS.

The plaintiffs, who are the heirs of *Joseph Thomas*, in their original and amended petition, claim title to this land under an act of Congress of the 28th February, 1823, which confirmed it to *John Henry*, upon *D. J. Sutton's* report, as register of the land office at Monroe, Louisiana, January 1st, 1821. They allege, that although it is true that the confirmation was thus made to *John Henry*, founded on a settlement and cultivation by *Joseph Thomas*, prior to the 20th December, 1813, and by conveyance from said *Thomas* to the claimant, yet in truth there never was any assignment of the claim by *Joseph Thomas* to *John Henry*; and on the trial of the cause, the plaintiffs introduced proof, that no evidence now exists, in the land office at Monroe, of any such assignment. This is proved by a certificate of the present register at that office, dated May 31st, 1851.

The defendant sets up title under the said *John Henry*. There was a verdict and judgment in his favor in the district court, and the plaintiffs have appealed.

On the trial of this cause, the district judge instructed the jury, "that by the confirmation, the title to the land in controversy was vested in *John Henry*; and unless the plaintiffs showed title through him since the confirmation, they could not recover." To this charge the plaintiffs took their bill of exceptions. We think the district judge did not err in this instruction, and this is indeed the only question to be decided in this cause. We still adhere to the opinions heretofore expressed by this court, in *Purvis v. Harmanson*, 4 Ann. 422, and *Lobdell v. Clark*, Ib., 99, and are yet disposed to follow the doctrine so often reiterated and affirmed by the Supreme Court of the United States, "that it would introduce infinite public mischief, were we to decide that the confirmation by the commissioners and Congress, made expressly to those who claim by derivative title, did not operate to their own use." *Strother v. Lucas*, 2 Peters, 458. *Marie Niccolle Les Bois v. Samuel Bramel*, 4 Howard, 449.

But the plaintiffs' counsel contends, that the act of Congress of May 11th, 1820, only authorized the register to receive evidence of the claim, to record the same, and send copies thereof, with his opinion as to the credibility of the evidence, to the Secretary of the Treasury, on or before the 1st January, 1821, but that there was no provision in that act, authorizing the register to adjudicate upon the claim. We cannot see that this alters the case. If the adjudication by a commissioner, in favor of the claimant, duly authorized by Congress to make such a decision, would have been final, we cannot perceive why a decision and confirmation by Congress itself, should not be equally valid and final.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

## H. KENDALL CARTER & CO. v. W. J. Q. BAKER.

A factor has a privilege upon the crop of the current year for all necessary supplies furnished to the plantation of his principal. C. C. 3184. Act of March 23, 1843, p. 44.

**A**PPPEAL from the District Court of the Parish of Ouachita, *Sharpe, J. McGuire and Ray*, for plaintiff. *Baker, proppriâ personâ*. By the court:

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v.  
BAKER.

DUNBAR, J. This suit is brought on a note for twelve hundred and ninety-five dollars, with 8 per cent interest from the 16th April, 1850, payable the 1st January, 1851, the payment of which is secured by mortgage. It appears that the plaintiffs were the factors of the defendant, and upon the settlement of his account with them on the 22d April, 1850, gave the note and mortgage above-mentioned. After the note and mortgage were given, as stated by a witness of the plaintiffs, who was their agent, the defendant solicited "other accommodations and supplies," which witness promised that plaintiffs would furnish him, "provided he would ship his growing crop, of the year 1850, to them," which was assented to; and the plaintiffs continued, upon this condition, to furnish the defendant advances and supplies.

In January, 1851, the defendant shipped to the plaintiffs twenty bales of cotton, which netted \$1093 11 and paid the account current of the defendant, leaving a balance in his favor on the 1st March, 1851, of \$591 10, which was imputed as a payment on the note sued on.

The defendant, on the 1st January, 1851, the date of the shipment of his cotton, wrote to the plaintiffs that he desired them to place the proceeds of the cotton to the payment of the note and mortgage, as it was the most onerous debt, and now sets this up as his defence to this action.

The district court gave judgment for the plaintiffs, disregarding this defence, and the defendant has appealed.

From the testimony of the witness before referred to, we think the district judge might very well have come to the conclusion, that the condition upon which the plaintiffs agreed to continue furnishing the defendant with supplies and accommodations was, that they should be paid out of the proceeds of the sale of the cotton shipped to them. See Acts of 1841, pp. 21-22, and 1843, p. 44. *Bloodworth v. Jacobs*, 2 Ann. 24. We do not believe that it was intended by the parties, that the plaintiffs should be placed in a worse condition than if they had been undertaking, for the first time, the factorage business of the defendant. If, after the settlement with the plaintiffs, he had employed a new factor, the latter would have had a privilege for all necessary supplies furnished his plantation on the crop of 1850.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

### THE UNION BANK OF LOUISIANA v. NARCISSA C. DOSSON et al.

A mortgage given directly in favor of the Union Bank for a loan of money, comes under the letter of the Act of 1843, and need not be reinscribed.

When an obligation is *prima facie* prescribed, there must be authentic evidence of the interruption of the prescription, before the party in whose favor the obligation is made can proceed by the *via executiva*.

The receipts of the cashier of a bank upon such an obligation, would not even be admissible to prove the interruption of prescription in an ordinary suit.

**A**PPEAL from the District Court of the Parish of Franklin, *Wilson, J. Phelps and Hendry*, for plaintiff. This is an application by plaintiff, for an order of seizure and sale against *Mr. N. C. Dosson et al.*, as owners and possessors of a tract of land and slaves, mortgaged by *Hugh B. Johnson* and his wife *Mary Johnson*, to the Branch of the Union Bank of Louisiana, at

**Avoyelles.** The amount claimed is \$2500, with ten per cent interest from the 1st day of June, 1840. UNION BANK  
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The act of mortgage was recorded 1st day of June, 1833, the date of the bond and mortgage declared on. The bond was for five thousand dollars, and half of which has been paid. *Hugh B. Johnson* and his wife are dead. The property by various sales, which are shown by the record, has passed into the hands of third persons, in whose hands, plaintiffs seeks to enforce the mortgage, and have the same seized and sold to pay the balance of the debts and interest.

The petition was presented to Judge Barry, of the Eleventh District, who refused the order prayed for a seizure and sale. The ground on which the order was refused, was, that the mortgage had not been reinscribed within ten years after the first inscription.

The plaintiffs have appealed from this judgment refusing the prayer for writ of seizure and sale, and asks this honorable court to reverse the judgment of the judge below, and grant the order on the following grounds: 1st. The mortgage privilege was not lost upon the property mortgaged by the failure to reinscribe in ten years. The article 3333 of the Civil Code, does not apply to mortgages made in favor of property banks. The article of the code, has been so amended as to exclude the banks from the operation of the art. 3333 C. C. See Acts of March 11th, 1842, and 27th March, 1843. 2d. *Hugh B. Johnson* and his wife *Mary Dash*, both deceased, anterior to the expiration of the ten years, from the date of the first registry, or recording of the mortgage, and as his property went into the hands of a curator, and was administered as an insolvent estate. The mortgage privilege did not expire by the failure to reinscribe. This doctrine is held in 7 R. R. 62.

The charter of the bank authorizes the seizure of property mortgaged in the hands of third persons, in the same manner as if the property had not been transferred, and a surrender by an insolvent, does not impair the rights of the bank as mortgagee; consequently the death of the party in this case, and the subsequent sale of the mortgager's estate by the probate judge, has not destroyed the right of the bank to seize and sell the property in the hands of third persons to satisfy their debts.

The court is respectfully referred to the decision in 4th Ann. 471, in the case of the Improvement and Banking Company; although between ordinary persons, the inscription would fail for want of reinscription, but the Act of 1842, and No. 96, page 52, reinscription is unnecessary; and, the Acts of 1843, No. 87, page 52, take from the recorder of records, the power to erase mortgages for want of reinscription in favor of minors interested and absent persons, nor to such mortgages as in favor of property banks; and, the object of reinscription, is merely to dispense from searching more than ten years back in ordinary transactions. 4 L. A. 476.

*Garrett*, for defendant. 1. More than ten years had elapsed from the date of the mortgage, (June, 1833,) before any attempt was made to reinscribe it. The parish judge certifies, that it was reinscribed on the 22d August, 1843. At that time, it had passed into the hands of *M. B. Desha*, a third party holding by purchase. At the expiration of ten years, the mortgage ceased to be operative on the property in the hands of *Desha*. 2 Ann. 522-3. Ib. 111. Ib. 800. C. C. 3333.

The Act of 11th March, 1842, only makes an exception "as to mortgages which have been given or may be given by stockholders of the various property banks of the State." Acts 1842, p. 232. This was not a mortgage of that character. It is respectfully submitted, that the Act of 27th March, 1843, does not apply to a case like this. The rules of construction would hardly justify the conclusion, that the Act of 1843, repeals the general provision contained in C. C. 3333. At the time of the passage of the Act of 1843, the art. 3333, as modified by the Act of 11th March, 1842, was the law of the land. Does the "new law" of 1843, "contain provisions contrary to or irreconcilable with those of the former law?" C. C. 23. If the Act of 1843, can be so construed as not to interfere with the law as it then stood, is it not the duty of courts to adopt that construction? Is it safe to adopt as a rule of our jurisprudence, the principle, that the existing laws of the land may be repealed by implication, unless such repeal clearly and necessarily results from the subsequent legislative enactment? 4 Ann. 476. 3 Ann. 399. 2 Ann. 919. 1 Ann. 54. 5 Ann. 122. Ib. 397. The period of ten years from the date of the

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mortgage, expired on the 1st June, 1843. If the Act of 17th March, 1843, is applicable to the mortgage filed in this case, then the property in the hands of *Desha* would still be affected by it, if this act did not interfere with the vested rights of *Desha*. He purchased the property subject to a mortgage, which, according to the law, as it then stood, could only be preserved by a reinscription before the expiration of ten years. It is submitted, that a subsequent legislative enactment rendering his condition more onerous, would be unconstitutional, and its construction must be so limited, as not to increase his liability beyond what was implied in the terms of his contract.

2. The plea of the prescription of ten years, should be sustained. The only evidence of any acknowledgment by the debtor, consists of certain receipts entered on the back of the obligation, by the cashier. His would not be sufficient to sustain an ordinary action. The death of *Johnson* and wife, did not interrupt prescription. It runs in favor of as well as against successions. 11 R. R. 449. C. C. 3492, 3493. 12 R. R. 508-9. 2 Troplong, (prescription) 804 to 808.

By the court :

ROST, J. This is an appeal from the refusal of the district judge to grant the plaintiffs an order of seizure and sale of certain property mortgaged to them, by *H. B. Johnson* and wife, to secure a loan of money, and now held by the defendants as third possessors.

The appellees pray for the affirmance of the judgment, on the following grounds : 1st. The mortgage, so far as they are concerned, has been lost, for want of reinscription within ten years. 2d. The evidence upon which the order is asked, is not all authentic. 3d. The claim against the principal debtor is barred by lapse of time.

The mortgage given by *Johnson* and wife, was given directly in favor of the Union Bank, for a loan of money ; it comes, therefore, under the letter of the Act of 1843, dispensing all such mortgages from the necessity of reinscription. It may be observed, that the mortgage sued upon, was given within the ten years which preceded the promulgation of that act. The first ground is, therefore, not tenable. 4 Ann. 471.

More than ten years elapsed since the signing of the bond, but several partial payments are endorsed upon the back of it, by the cashier of the bank, the last of which, purport to have been made within the ten years which preceded the institution of these proceedings. This evidence of payment would, perhaps, be unobjectionable if the plea of prescription could not be set up. But, as the obligation is *prima facie* prescribed, there must be authentic evidence of the interruption of the prescription, before the party can proceed by the *via executiva*. The receipts of the cashier, so far from having that character, would not be admissible to prove the interruption of prescription in an ordinary suit. His testimony to the same fact being superior evidence, we are, therefore, of opinion, that the district judge did not err, although we do not agree with him in the reasons he gave for refusing the order of seizure and sale.

The judgment is affirmed, with costs.

SLIDELL, J. Where an obligation is on its face so ancient as to appear to be prescribed, I do not think an order of seizure and sale should be issued upon it, especially against a third possessor, without authentic evidence, that prescription has been interrupted or renounced. Here, there was no such evidence. The endorsements of payment by the cashier, have no authenticity.

Considering this a sufficient reason for not disturbing the decree of the district judge, I have not thought it necessary to express an opinion upon the subject of reinscription.

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## STATE v. WILSON TUCKER.

Appeal dismissed, because the record was defective, containing no final nor interlocutory decree, upon which the court was authorized to act.

The statute of 1846 (p. 335 of the Revised Statutes) gives to the Supreme Court jurisdiction of an appeal in criminal cases, from final judgments alone, returnable as in civil suits, and requires the clerk of the court granting the appeal, to make out the transcript, as in civil cases.

**A** PPEAL from the District Court of the Parish of Bossier, *Charles A. Bullard, J. C. H. Morrison*, District Attorney, for the State. *Lawson and Cooke, and Stillman*, for prisoner. By the court:

**DUNBAR, J.** The defendant indicted for the crime of murder, was found guilty by a jury, as charged in the bill of indictment, without capital punishment,

The case comes before us upon motions in arrest of judgment, for a new trial, and various bills of exceptions, all of which have been argued by counsel, on behalf of the State and the prisoner. Upon the examination of the record, we find it so exceedingly defective, that we feel ourselves constrained to dismiss the appeal. It contains neither a final or interlocutory decree, upon which we are authorized to act.

The statute of 1846 gives to this court jurisdiction of an appeal in criminal cases, from final judgments alone, returnable as in civil suits, and requires the clerk of the court granting the appeal, to make out the transcript of the record, as in civil cases.

It is therefore ordered, that the appeal in this case be dismissed, without prejudice to the right of the accused to take another appeal.

Application for re-hearing was made, and Acts 1839, March 10th, page 170; 17 L. R. 115; 17 L. R. 466; 2 Ann. 769, cited. Re-hearing refused.

## T. PHELPS et al. v. GEORGE S. SAWYER, Administrator.

## GEORGE S. SAWYER v. Sureties of STONE.

A judgment rendered against an absent defendant, unrepresented by a curator *ad hoc*, or by a properly constituted agent, will be annulled and set aside.

A suit against the sureties upon an administrator's bond will be dismissed unless there be a judgment against the administrator, or he be made a party defendant.

**A** PPEAL from the District Court of the Parish of Catahoula, *Barry, J. Sawyer*, for plaintiff. *Curry and Hendry*, for defendant. By the court:

**ROST, J.** *Samuel P. Stone*, the administrator of the succession of *Elias Carter*, deceased, having absconded without settling his accounts, the plaintiff was appointed in his place, and brought suit to compel him to account. The petition was answered and an account of *Stone's* administration, filed by *Elias Carter, Jr.*, who pretended to be the agent of *Stone*. Judgment was rendered

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in favor of the plaintiff, in that suit, for \$1031. Execution having been issued on that judgment, and return, "no property found," the administrator brought suit against the sureties of *Stone* on his bond.

The defendants in that suit alleged as one of the grounds of their defence, that the judgment against *Stone* had been obtained by fraud and collusion, and brought a separate action against the administrator to annul it. There were other grounds of defence, which it is unnecessary to notice.

The suit of the administrator against the sureties, and that brought by the sureties to annul the judgment against *Stone*, were consolidated and tried together. The district court annulled the judgment and dismissed the action against the sureties as in case of non-suit. The administrator has appealed.

The power of attorney under which *Elias Carter, Jr.*, represented *Stone* in the first suit, is in evidence. It is essentially a special power, and conferred no authority on *Carter* to defend that suit. The plaintiff had asked for the appointment of a curator *ad hoc*, but no appointment was made; and as the defendant was unrepresented in the proceedings, the judgment rendered against him was properly annulled and set aside.

There being no judgment against the principal debtor, and he not being made a party defendant in the suit against the sureties, that action was also properly dismissed.

The judgments in both cases are therefore affirmed.

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### PITTS et al. v. LEWIS et al.

It is an elementary principle, that there is no *vente à reméré* unless the right to take back the property, on refunding the price, be stipulated in the act of sale, so as to form one of the reservations of it; and that if the stipulation is appended by a subsequent act to a sale originally pure and simple, it is either a resale or a promise to sell.

**A** PPEAL from the District Court of the Parish of Bienville, *Bullard, J. Land and Cook*, for plaintiffs. *Spofford*, for defendants. By the court:

ROST, J. The plaintiff sues for the resolution of a sale of slaves, which he alleges to have been a *vente à reméré*. She has made a tender of the price, and claims the slaves together with damages for the loss of their services.

The defendant, *Martha C. Lewis*, the wife of *John L. Lewis*, separated in property from him, alleges that the sale to her was absolute and unconditional, and that the slaves being at the time in her possession, under another title, the delivery followed the act of transfer. That after the sale her husband was prevailed upon to sign, on her part, a gratuitous promise to reconvey to the vendor, for the price stipulated in the sale, a portion of said slaves within two years, provided her circumstances should continue in such condition as would justify her in doing so. That she had no knowledge of the instrument sued upon; never assented thereto, and is not in a condition to return said slaves, having been compelled to include them, with other property, in a mortgage given by her to secure a loan.

On these issues there was judgment in favor of the defendant. The plaintiff has appealed.

It is elementary that there is no *vente à reméré* unless the right to take back the property, on refunding the price, be stipulated in the act of sale, so as to

form one of the reservations of it, and that if it is appended by a subsequent act to a sale originally pure and simple, it is either a resale or a promise to sell.

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In this case the act of sale first passed was unconditionally and absolute. The plaintiff cannot therefore claim the resolution of that sale, and must recover, if at all, upon the subsequent promise of the defendant's husband to reconvey certain of the slaves to her.

The district judge appears to have been of opinion that the defendant's husband had no authority to make such a promise, and that it had not been ratified by her.

We think that the evidence in the record authorizes those conclusions. The promise of the husband being a new contract, the defendant may repudiate it, while she adopts the original sale. There is nothing in the record from which a waiver of this legal right can be inferred.

Judgment affirmed, with costs.

SLIDELL, J. As I understand the agreement, as to redemption, supposing it to have been executed with the authorization of *Mrs. Lewis*, it does not create such a right in the plaintiff as she can enforce. For the agreement, in substance, is a promise to permit the plaintiff to redeem two of the negroes, at a stipulated sum, provided the circumstances of the defendant should hereafter be such as to enable her to restore them. But her circumstances have compelled her to mortgage them; and the promise, even if it had any binding force, was qualified by a condition, which has occurred, and this apparently without any bad faith on the part of the defendant. It seems to me, therefore, that upon this ground the judgment ought not to be disturbed.

### STEPHENSON v. WILSON.

This suit was brought to make a son liable for a debt due by his father, on the ground, that he (the son) had received a large portion of his father's property during his lifetime, upon condition of paying his debts, and had, after his death, intermeddled with his succession, and converted its property to his own use. The prescriptions of three and five years, under articles 1176, 1380, and 3507 of the Civil Code, do not apply.

If a son, on the death of his father, takes possession of his property and treat it as his own, without any letters of administration obtained, or judicial proceedings had, he will under our laws, be held responsible to creditors.

It is apprehended, that the law is the same in Arkansas.

**A** PPEAL from the District Court of the Parish of Caddo. *Bullard, J.* *Landrum*, for plaintiff. Plaintiff contends the sale under which *James M. Wilson*, defendant, claims the slaves of his father, is fraudulent, and as to them, null and void *ab initio*. The property having remained in possession of the vendor, and they being creditors prior to the sale. 3 Peters, 196. 1 Cranch, 309. 6 N. S. 641. U. S. Digest, vol. 5, p. 45, sections 3903, 389, 394, 377; p. 47, sec. 419; p. 48, sec. 442. See supplement to U. S. Digest, vol. 2, same pages.

The defendant had no shadow or color of title to the negroes he took into his possession, on the death of his father, and he pretends to none to the personal effects he administered. He was, therefore, an administrator to his own wrong, and liable for the debts of his father, to the value of the assets he inter-

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meddled with. 17 L. R. 333. 1 R. R. 435. 8 L. R. 308. U. S. Digest, vol. 4, p. 830, sec. 926, 932, 936, 940; p. 831, secs. 943, 950, 955, 956. See supplement to U. S. Digest, vol. 1, same pages.

The sale as to third parties had no effect until after registry. B. and C. 596. 2 L. R. 125. 2 L. R. 122. 5 L. R. 263. C. C. 2417, 2242, 2250.

Declaration that price had been paid, is no proof against third parties. 12 R. R. 95.

The unconditional acceptance of a succession, makes the acceptor liable for the debts. C. C. 982, 986. The debtor's property is a common pledge to his creditors. C. C. 3143, 3150, 1963, 1964. 4 N. S. 174. 4 L. R. 127.

As to liability and acts which constitute one executor *de son tort*. U. S. Digest, vol. 2, p. 302.

*Crain*, for defendant, cited 19 L. R. 524. By the court :

SLIDELL, J. The object of this suit, is to hold *James M. Wilson*, liable for a debt due by his father, *Jason H. Wilson*, upon the ground, that he had received a large portion of the property of his father during his lifetime, under condition of paying his debts, and had, after his death, intermeddled with his succession, and converted its property to his own use. There was a judgment in favor of the plaintiff in the court below, and the defendant has appealed.

We have carefully considered the testimony in this cause, and are unable to say, that injustice has been done to the defendant by the judgment below.

It appears from the testimony of a relative of the defendant, that the father, shortly before his death, conveyed a large number of slaves to the defendant; and that there was a written contract prepared by the witness, at the request of the father, which, according to his recollection, was signed, whereby the son agreed in consideration of the transfer, to pay the father's debts, including that to the plaintiff. It is true, the witness states, that the son subsequently declared to him, that they had not closed that agreement, but altered the arrangement, and excluded the debt due to the plaintiff. But if this was the defendant could have relieved himself of the unfavorable effect of the witnesses' testimony, by producing the subsequent agreement, or proving its contents. This he has not done.

If, on the other hand, the defendant repudiated altogether the existence of an agreement to pay his father's debts as the consideration of the sale, and relied upon the bills of sale of the negroes to himself, which purport to be for a cash consideration of \$8111, he is met by the grave difficulties, which result from the evidence of his want of means to make such a cash purchase, the continued possession of his vendor, and the embarrassed state of the vendor's affairs: circumstances which may have induced the district judge to treat the sales as simulated.

In addition to these circumstances, it appears that, on the death of his father, the defendant took possession of the slaves and other property, and treated them as his own, without any letters of administration obtained, or judicial proceedings had, in the State of Arkansas, where the slaves and effects were. This intermeddling, we apprehended, would create a responsibility to creditors under the law of Arkansas; and, certainly, under our jurisprudence, would not leave the defendant on a better footing.

The prescriptions of three and five years, under articles 1176, 1380 and 3507 of the Civil Code, which are referred to by counsel, do not seem to us, applicable to the present controversy.

Judgment affirmed, with costs.



## SIMPSON, Tutor, v. POWELL, Administrator.

It is not sufficient for the plaintiff to make out a probable case, he must make it certain.

And where the suit is delayed until after the death of the person against whom the claim is alleged to have existed, and where, if it existed at all, it must have been known in his lifetime, the testimony should be peculiarly strong.

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**A** PPEAL from the District Court of the Parish of Caddo, *Jones, J. Land and Cook*, for plaintiff. *Royson and Spofford*, and *Crain*, for defendant. By the court:

*Rost, J.* *Benjamin Davis* died in the month of January, 1847, leaving as his heirs *Celina Davis*, the mother of the minor, for whose benefit the plaintiff sues, *Martha Davis*, wife of *W. Morgan*, and *Emily C. Davis*, the surviving wife and administratrix of *Augustus N. Powell*, who died in the fall of 1850.

The petition alleges that *Davis* had, when he died, a sum of \$6000 in his house; and that *Powell*, who lived with him at the time, took that sum and converted it to his own use. The prayer is, that his administratrix be compelled to account to the plaintiff for one-third of said amount. In an amended petition the plaintiff further alleges, that *Powell* received from *Davis*, in his lifetime, the sum of \$3000, to be invested in land and slaves, for which he never accounted; he also prays judgment for one-third of said sum. *Mrs. Morgan* has joined the plaintiff in the action, praying for her share of whatever may be recovered.

The defence is a general denial. There was judgment against the succession of *Powell* for \$1700, to be distributed among the three heirs. The defendant has appealed.

The district judge states at large in his opinion, the evidence upon which he relies. That evidence makes out a probable case in favor of the plaintiff. But this is not sufficient, he should have made his case certain; and the testimony adduced by him should have been peculiarly strong and conclusive to do away the unfavorable presumption arising from the delay in bringing the suit, and from the fact that it was not commenced until after the death of *Powell*, although the main fact upon which it rests must, if it existed, have been known to the children of *Davis* at the time it occurred.

There is no direct proof of the taking of the money by *Powell*, or anything inconsistent with the hypothesis that if money of *Davis* came into his possession, it was given to him by *Davis* himself.

As the judgment below was for the plaintiff, we would, perhaps, have remanded the case but for some circumstances which the record discloses. One witness testified much more positively in favor of the plaintiff than any other, but his testimony is so pregnant with falsehood that the district judge has taken no notice of it in his elaborate opinion. It is shown that this witness resides out of the parish in which the case was tried; that the plaintiff went for him and procured his personal attendance at two successive terms of the court. We will not give the opportunity of renewing such exhibitions.

It is ordered that the judgment in this case be reversed, and that there be judgment in favor of the defendant, with costs in both courts.

## EDWARD BAKER f. m. c. v. SUSAN TABOR.

Although the master of a slave may have lost his right of dominion over him, by receiving from him a sum of money for his emancipation, and by permitting him to enjoy his liberty for more than ten years, the act of emancipation, passed according to the forms of law, can alone give the slave the *status* of a free man, which he must have before he can prosecute in a court of justice any claim, except his claim for freedom.

He may appear in court to claim his freedom before emancipation.

The master may claim in his own name, the benefit of any contract, and the damages resulting from the breach of any contract entered into by the slave, not emancipated according to the forms of law.

The right of the master to claim the services of his slaves may cease, but his duty to protect them, terminates only with their life.

**A** PPEAL from the District Court of the Parish of Caddo, *Jones, J. Hodge and Turner*, and *Buckner*, for plaintiff. *Roydon and Spofford*, for defendant. By the court:

ROST, J. The defendant excepted to the action in this case, on the ground, that the plaintiff was born a slave; that he has never been emancipated in conformity with the laws made for the emancipation of slaves, and is without capacity to stand in judgment. The exception was sustained in the court below, and the plaintiff has appealed.

The facts are as stated by the defendant, and the legal inference which grows from them, is inevitable. Although the plaintiffs' master may have lost his right of dominion over him, by receiving from him a sum of money for his emancipation, and by permitting him to enjoy his liberty for more than ten years, the act of emancipation passed according to the forms of law, can alone give him the *status* of a free man, which he must have before he can prosecute a claim, such as this, in a court of justice. Before emancipation, he can only appear in court to claim his freedom.

We are, therefore, under the painful necessity of affirming the judgment.

We deem it our duty to state, the cause of the plaintiff appears to us a just one; and, that he is not without a remedy. His master may claim, in his own name, the benefit of the contract entered into by him, and the damages resulting from the breach of it by the defendant, and he will, no doubt, deem it his duty to do so.

The right of the master to claim the services of his slaves may cease, but his duty to protect them, terminates only with their life. Even after emancipation, he is bound, not only to protect, but also to maintain them, when they are no longer able to maintain themselves.

The judgment is affirmed, with costs, without prejudice to a future action.

## GREEN HILL v. SNYDER, Administrator.

This suit was brought upon a judgment obtained in Mississippi. The statute of limitations was plead in defence. The plea was held to be bad, because the statute did not apply in consequence of the absence of the defendant from the State of Mississippi. Hutchinson's Code, 831, sec. 11.

When a suit has been brought against A and B, as partners, using the name and style of A and B, upon a negotiable note made by them as partners, the judgment obtained will be considered, at common law, a judgment *in solido*.

**A** PPEAL from the District Court of the Parish of Bossier, *Bullard, J. Crain and Spofford*, for plaintiff. *Lawson*, for defendant. By the court:

DUNBAR, J. This suit was brought to recover of the defendant, the amount of a judgment which the plaintiff obtained against *Nolley Gilmore* and *Thomas D. Connell*, in the State of Mississippi. The defendant pleaded a general denial, payment, and the prescription of seven years, to plaintiff's cause of action, under the statute of limitations of the State of Mississippi, passed the 24th February, 1844, prohibiting any action of debt on any judgment of that State, seven years after its rendition. He also further pleaded, that *Thomas D. Connell* was only liable for one half of the plaintiff's demand, because the judgment was not *in solido*. On the trial of the case, the laws of Mississippi were given in evidence; there was judgment against the defendant for the whole amount claimed, and he has taken this appeal.

We find, by reference to the law of limitations of actions, remedies, &c., of the State of Mississippi, (Hutchinson's Code, 831, sec. 11,) it is provided: "If any person or persons against whom there is, or shall be, any cause of action, as specified in the preceding sections of this act, (except for the recovery of lands, tenements, hereditaments or leases, for a term of years) is, are, or shall be, out of the State at the time of such cause of action occurring, or at any time during which a suit might be sustained on such cause of action, then the person or persons who are or shall be entitled to such action, shall be at liberty to commence the same against such person, after his, her, or their return to this State; and the time of such person's absence, shall not be computed a part of the time limited by this act." The evidence in this cause shows, that *Thomas D. Connell* moved to the parish of Bossier, in the State of Louisiana, in February, 1845, where he remained until the day of his death, without having returned, in the intermediate time, to the State of Mississippi. The judgment now sought to be enforced against his administrator, was rendered in Mississippi, on the 17th May, 1841. It is therefore clear, that even by the laws of Mississippi, an action of debt could be maintained against his administrator on this judgment, under the circumstances above related. This view of this portion of the defence, will render it unnecessary for us to decide whether the law of prescription of Louisiana, should control this case.

It is contended on the part of the defendant, if this debt is not prescribed, yet, that he is liable for only one half of it, as the judgment is not *in solido*.

It appears, from the record, that the suit in Mississippi was brought by the plaintiff against *Gilmore* and *Connell* as partners, using the name and style of *Gilmore and Connell*, upon a negotiable note made by them as partners, paya-

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ble to the plaintiff or bearer for value received, and that the judgment now sued upon, was rendered against them in that capacity. We think there can be no doubt, that at common law, which prevails in Mississippi, this would be considered a judgment *in solido*. It is further contended, that the defendant is entitled to a credit for a payment made to the sheriff in Mississippi, endorsed upon the execution which issued upon the judgment of certain bank notes of a bank in Alabama, and an order for a small amount on the clerk of the court. There is no evidence to satisfy us, that the plaintiff ever sanctioned such a payment to the sheriff, or that he had any notice thereof. This payment cannot, therefore, be allowed.

The judgment of the district court is affirmed, with costs.

### SAME CASE—ON A RE-HEARING.

In this case, defendant claimed a credit for a payment made to the sheriff in Mississippi, and endorsed upon the execution. By the Court: "It has been held by the Court of Errors and Appeals in the State of Mississippi, and by the Supreme Court of the United States, in a case coming from that State, that lapse of time was sufficient ground for inferring the implied sanction of the plaintiff to the act of an officer who had collected uncurrent notes." We will, therefore, amend the decree which has been rendered in this case, by allowing the aforesaid credit.

By the court:

DUNBAR, J. A re-hearing has been granted in this case, upon the ground, that the defendant is entitled to a credit of two hundred and five dollars and ninety-one cents, which appears from the return of the sheriff of Choctaw county, Mississippi, on the execution issued against him in that State, which is in the following words: "Received of *Thomas D. Connell*, one hundred and eighty-eight dollars and ninety-six cents, in the bills of the bank of the State of Alabama, on this execution, October 7th, 1842; also, *James Phagan*, clerk of the Circuit Court of Winston county, order for sixteen dollars ninety-five cents, October 7th, 1842. EDWARD JOHNSON, Sheriff, C. C."

We find from authorities furnished since our first opinion was rendered, that it has been held by the Court of Errors and Appeals in the State of Mississippi, and by the Supreme Court of the United States, in a case coming up from that State, "that lapse of time was sufficient ground for inferring the implied sanction of the plaintiff to the act of an officer who had collected uncurrent notes." *Woodward v. Fisher et al.*, 11 Smedes and Marshall, 303. *Buchanan, Hagan & Co. v. Terinin*, 2 Howard, S. C Rep. 258. We will, therefore, amend the decree which has been rendered in this case, by allowing the aforesaid credit.

It is therefore ordered, that the judgment of the district court be so amended, as to allow a credit to the defendant of two hundred and five dollars and ninety-one cents, as of the 7th October, 1842; and, that the said judgment be in all other respects affirmed, the appellee to pay the costs of this appeal.

## WASHINGTON JENKINS v. THE PARISH OF CADDO.

He who sells a debt or an incorporeal right, warrants its existence at the time of the transfer, though no warranty be mentioned in the deed.

Even in case of stipulation of no warranty, the seller, in case of eviction, is liable to a restitution of the price, unless the buyer was aware at the time of the sale of the danger of the eviction, and purchased at his peril and risk.

The following order is not a bill of exchange: "On demand please pay to the order of *W. J.* the sum of seven thousand dollars, according to a donation made by the Shreveport Town Company to the parish, the same to be in accordance with a resolution of the police jury, passed October 6, 1840." It commences with a direction to pay a sum certain, on demand, but it is qualified by the subsequent reference.

**A** PPEAL from the District Court of the Parish of Caddo, *Bullard, J. Royson* and *Spefford*, for plaintiff. *Terrell* and *Hodge*, for defendant. By the court:

**SLIDELL, J.** This suit was brought by the plaintiff, to rescind the sale of certain lots of ground, or to recover the sum of four thousand dollars, alleged to be due him by the parish of Caddo. He represents that, on the 4th day of November, 1840, he sold to the parish of Caddo certain lots of ground; that the consideration of said sale was the sum of eight thousand dollars, seven thousand to be paid to him in a draft, to be drawn by the president of the police jury of said parish on the Shreveport Town Company, and one thousand by draft on the treasurer of the parish. He admits that the last mentioned sum has been paid. He also avers that he was induced to believe that said company was indebted to the parish in the sum of seven thousand dollars, and that he agreed to take, in part payment of the purchase price of his lots, the draft aforesaid, and to release the parish from the payment of the same. He also alleges, that the said company was never indebted to the parish of Caddo in any amount. He admits that he has received three thousand dollars upon the draft, and states that he has credited this amount upon the seven thousand due him by the parish; and avers that he has been unsuccessful in a suit against the four members of the company, who refused to pay, upon the draft.

The defendant pleaded the general issue, and also, that the property was purchased with the understanding that plaintiff was to receive the draft in part payment of the price of the lots, without any recourse whatever on the parish. The prescription of five and ten years is also pleaded.

There was judgment for the plaintiff for four thousand dollars, with the vendor's privilege, upon the lots sold. The defendant has appealed.

The facts of this case, so far as they are disclosed by the evidence, are as follows: The police jury of the parish of Caddo were about to determine the site of a court house. The subject was one, we may reasonably presume, of much interest to owners of property in the parish, as it might probably enhance the value of lots near the place which might be chosen. There appears to have been in existence, in 1840, an association of individuals styled the Shreveport Town Company, and composed of seven members, *Angus McNeil, Bushrod*

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CADDO.

*Jenkins, Henry M. Shreve, Sturges Sprague, Thomas F. Williamson, James B. Pickett and the firm of Cane and Bennett.*

The plaintiff and another person offered lots to the police jury. The proposition of the plaintiff was, after a good deal of discussion, considered the most advantageous; and, accordingly, on the 4th November, 1840, a notarial act was executed, in which the plaintiff sells to the parish of Caddo, represented by its police jury, three lots of ground in Shreveport and the buildings thereon, for the price of \$8000, payable in the following manner, as recited in the deed: "Seven thousand dollars to be paid in a draft, drawn by the president of the police jury, and signed by him as their authorized agent, the draft to be drawn on the Shreveport Company, and to be received at par value without any subsequent recourse to law or equity upon said parish or its acting agents. Also, a draft for a thousand dollars, to be drawn and executed by said *Thomas Craighead Porter*, as agent of the police jury, duly authorized to draw on the treasurer of said parish, *Daniel W. Edgerley*, for the abovementioned amount." The deed recites, that it is executed by the president of the police jury, under the authority of a special resolution of the police jury, dated 6th October. We find no copy of it in the transcript, and are left in ignorance of its contents, except so far as they may be inferred from the action of the president. The draft on the treasurer has been paid. The draft on the Shreveport Company is in the following form:

"\$7000. Shreveport, November 4, 1840. On demand please pay to the order of *Washington Jenkins* the sum of seven thousand dollars, according to a donation made by the Shreveport Town Company to the parish, the same to be in accordance with a resolution of the police jury, passed October 6, 1840.

"*Tho's. C. Porter*, President of Police Jury.

"*Mr. Bushrod Jenkins*, parish of Caddo, Treasurer of Shreveport Town Company."

Upon this draft the plaintiff admits, in his petition, that he has received \$3000 from *Bushrod Jenkins*, *James H. Cane* and *Thomas F. Williamson*, three of the members of the company. But the draft also exhibits an acceptance, of the following tenor: "I accept, for one thousand dollars, to be paid out of the notes in the hands of *B. Jenkins*, treasurer of the Shreveport Company. *W. W. George*, curator of succession of *S. Sprague*." The draft exhibits acceptances, in a similar form, by *Williamson* and *Cane*, for \$1000 each, and an absolute acceptance for the amount by *B. Jenkins*.

It is admitted that the lots, described in the act of sale, have always been used for parochial purchases since the sale. The court house was established upon it.

*Angus McNeil* was examined as a witness, by the plaintiff, under commission. His testimony is loosely taken. The substance of it is, that he was well acquainted with the affairs of the Shreveport Company, but that he removed from the parish in June or July, 1840, up to which time he acted as its president. He says his impression was, that, as president, he offered the police jury seven thousand dollars if they would locate the county seat at Shreveport, but they never did so locate it as long as he remained at Shreveport. He declares that he is satisfied that the Shreveport Company never owed the parish anything; but in answer to the interrogatory put by the defendant, "What induced the company to agree to pay each one thousand dollars?" he says. "The inducement was to have the county seat located at Shreveport."

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There is an admission in the statement of evidence, that *Bushrod Jenkins, Cane, and Williamson*, each voluntarily paid \$1000 on the draft, but that the others denied their indebtedness, and have paid nothing. That the plaintiff brought two suits against those members for their proportion, which terminated in favor of those defendants. One of those suits was against *Pickett's* heirs; and a witness, who was attorney for the plaintiff in that suit, testifies that he got all the testimony he could in that suit, and used unusual diligence in its prosecution, but lost it on the merits.

Upon what ground, particularly, the suits were defeated, does not appear.

The draft for \$7000 was given in part payment of the price of the purchase. Under the facts, so far as they have been disclosed, it was, in legal contemplation, the transfer of a debt for a valuable consideration, to wit, the land conveyed to the transferee by the transferor. The general rule is, that he who sells a debt or an incorporeal right, warrants its existence at the time of the transfer, though no warranty be mentioned in the deed. Civil Code, art. 2616. The principle recognized by this article is well stated by Domat. "As in the sales of movables and immovables, natural warranty obliges the seller to deliver and warrant a thing which is in being; so likewise in the sales or conveyances of rights, such as a debt, an action, an inheritance; natural warranty obliges the transferor to transfer a right which subsists, a debt which is due, an inheritance which has fallen, an action which may be prosecuted; and if the transferor had not the right which he sells and transfers, the sale would be null, and he would be bound to restore the price and make good the damages of the buyer or transferee." See also *Toler v. Swayze*, 2 Ann. 880.

But although such is the general rule of law, there is no doubt the contracting parties may make a law for themselves, and diminish or restrain, by their convention, the responsibility which, in their silence, the law would attach to their agreement. And this leads us to consider whether, in the present case, the parties have so agreed, as to take the case out of the general rule.

It is said they have done so by the clause in the deed which declares, that the draft was "received at par value without any subsequent recourse to law or equity upon said parish or its acting agents." But we are of opinion that this clause has not such an effect. The claim was not transferred as a mere chance; there is nothing to show that the transferee was informed, at the time, of an uncertainty of the existence of the claim, and purchased it at his own risk and peril. Under such circumstances the stipulation must be construed, as dispensing the transferor from responsibility for the solvency of the Shreveport Company, but not from the implied warranty of the existence of the debt. The principle which controls this question is found in that article of our code, which, in treating of the contract of sales, declares that even in case of stipulation of no warranty, the seller, in case of eviction, is liable to a restitution of the price, unless the buyer was aware, at the time of the sale, of the danger of the eviction, and purchased at his peril and risk. Civil Code, art. 2481 See also *Pothier vente* No. 186. *Troplong vente* 936 *et seq.*

Before leaving this branch of the subject, it is proper to observe that we do not look upon the draft as a bill of exchange, a contract which would, under the commercial law, be controlled by different rules. It is not so on its face. It is true, it commences with an order to the drawee to pay a sum certain, on demand, but it is qualified by the subsequent reference to a donation, and a resolution, in accordance with which the payment is to be made, and the nature of which is

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unexplained by the instrument, and undisclosed by the evidence. The stipulations in the deed also show that it was not intended the drawer should assume the attitude of an ordinary drawer of a bill.

We come now to the inquiry, whether there was, at the time of the sale, no existing liability by the Shreveport Town Company, or its members, to the parish of Caddo.

Upon this point we have no hesitation in saying, that the judgment of the district court is, in part, manifestly erroneous; and, as to the residue of the case, it is presented in such a manner, by the evidence, as to leave our minds in doubt as to the true merits of the controversy.

We have seen that this company, which was incorporated, consisted of seven members. The plaintiff took acceptances from four of those members for their proportion of \$1000 each. Those who thus accepted have paid. One of them has not paid; but by taking his acceptances, the nature of which is above mentioned, the plaintiff clearly took him as his debtor *pro tanto*, and extinguished any claim he might have for recourse *pro tanto* upon the defendant. It is inadmissible for the plaintiff now to say, that as to this amount, the claim transferred had no existence, and that the implied warranty has been falsified.

With regard to the liability of the other members of the company who have not paid, so much of the nature of the transaction is left undisclosed, that we are unable to speak with certainty as to the rights of the parties. The resolution of the police jury of 6th October is not before us, nor is the donation made by the Shreveport Town Company to the parish, which is spoken of in the draft. Nor are we informed of the precise grounds upon which the suit against *Pickett's* heirs was lost. On the other hand, although ten years, save a fraction of a single day, had elapsed from the time when the plaintiff received the draft to the institution of this suit, no attempt whatever was made in this long interval to recur to the defendant. The staleness of the demand casts a shade over the plaintiff's pretensions, which justifies a court of justice in requiring a more satisfactory showing than has been made in this case, to hold the defendant liable for this large amount.

Judgment reversed and the cause remanded; costs of appeal to be paid by the plaintiff.

### JOHN TEMPLE v. MOSES SMITH.

A signature may be proved by means of comparison with other documents, signed by the party against whom the proof is to be made, whether such other documents are authentic, or their genuineness is first satisfactorily proved.

This doctrine applies, not only to cases when the instrument to be proved is the immediate basis of the action, but also to cases where the instrument is offered as a matter of evidence upon incidental questions.

The testimony of experts, sworn to give evidence upon the comparison of signatures, should be considered, and acted upon with much caution by a jury, who are not bound to surrender their own opinions, formed by their own comparison, to the opinions of witnesses, however experienced.

**A** PPEAL from the District Court for the Parish of Morehouse. *Sharp, J. Parsons and Newton*, for plaintiff. When a party denies his signature or his writing, (as in this instance,) it may be proved in three different ways, either



by persons who saw him write it, or by persons who have frequently seen him write and sign his name, or by comparison. C. P. art. 325. C. C. 2241. 2 M. R. 212. 3 M. R. 350. 9 L. R. 405. 15 L. R. 173.

Plaintiff could not be restricted to the manner of making the proof, because the latter clause of art. 325, C. P. expressly declares, that the proof by witnesses shall not exclude the proof by experts or comparison.

*McGuire* and *Ray*, for plaintiff. Comparison of handwritings is one, and a very general mode of proof, in the common law courts. *Greenleaf on Evidence*, § 576, says: "All evidence of handwriting, except when the witness saw the document written, is, in its nature, comparison." But the mode of the witness acquiring the knowledge to enable him to institute the comparison, seems to be the great difficulty. Two modes of acquiring that knowledge are stated in § 577, to be considered sufficient: both these modes imply a personal knowledge in the witness of the handwriting. There are two universally admitted exceptions to this rule in § 578, the second of which applies to this case very nearly, as one of the documents used for the comparison, is the bond signed by defendant in this case, to release the attachment. But the direct question in this case, whether papers irrelevant to the record may be admitted, for the sole purpose of creating a standard of comparison of handwritings, seems to have been very elaborately discussed in the case of *Doe v. Stuckermen*, 5 Ad. and El. 703, in which case the King's Bench were equally divided—Lord Denman, C. J., being in favor of receiving them. *Greenleaf*, § 581, says: "The American decisions are far from being uniform on this question." In Massachusetts, Maine and Connecticut, such evidence is uniformly admitted, and, with some restrictions, in many other States. On this point, we would respectfully refer to the very lucid and able argument of Mr. Evans in his 2d vol. of *Pothier*, p. 185, and to Lord Denman's argument in the case. 5 Ad. and El. 422 to 429. 4th vol. *Hill and Cowens' notes to Phillips on Evid.* pp. 1330, 1331—authorities from Massachusetts, Connecticut and Louisiana.

There is still another reason why experts should have been appointed in this case. The document 'A' is evidently an attempt at disguising the real handwriting, and experts are always received to testify whether the writing is a real or feigned hand, and may compare it with other writings already in evidence in the case. See note 4 to § 580 of *Greenleaf on Evid.*, and the authorities there cited.

*Todd* and *Robinson*, and *Boatner*, for defendant. We fully concur with the plaintiff's counsel in some of the positions assumed by them, in the argument of their points. For instance, they state "that document 'A' is not, in the sense of art. 324, C. P., the foundation of the suit, and therefore is not subject to the modes of proof therein specified. We agree with them further, that article 325, C. P., is an exception to the general rule of evidence, and must be confined to cases to which it clearly applies. They, however, contend, that article 2241 of the Civil Code, lays down the general rule for proving handwritings and signatures in all cases. So far from this being the case, the last article referred to is modified and superseded by art. 325, C. P., as was decided in the case of *Plicque* and *Le Beau v. La Branche et al.* 9 L. R. 562. They therefore must refer to the same class of cases. And from this, it results, that there is no express provision in either code for the proof of handwriting and signatures, except of such documents as are embraced in the articles referred to. That is, of such only as form the basis of the action, and where the defendant has been called on expressly to avow or disavow his signature. Nor has this question been settled by the decisions of this court; all the decisions cited by the counsel applying only to cases where the document to be proved formed the basis of the action, and therefore coming under the rule of the articles referred to.

We must therefore resort to elementary works on evidence, and the decisions of other tribunals, to settle this point; and we think that an examination of these, will satisfy the court that our position is correct.

All the old common law authorities are most decidedly against this mode of proof: it is a mode almost at one time unknown to the common law, and never resorted to in any instance. The attempt to introduce it under that system, has been comparatively of recent date; but the current of decisions, both in England and this country, is still against its admissibility. In nearly every State the

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common law rule has been adopted, excluding this mode of proof. And we would refer the court to Phillips' Evidence, vol. 1, p. 490, Starkey Ev. p. — and to the notes on Phillips from page 1326 to 1331, and to the numerous authorities there cited.

If, however, the court should think that proof by comparison was properly allowed in this case, then we contend, that the ruling of the court below was correct, refusing to permit the comparison to be made, either by witnesses or experts, but requiring it to be made by the jury. In all the cases cited by the counsel, where this mode of proof has been allowed, it will be found, that it has been left to the jury to compare the writings, without aid from any other source to assist their judgment. It is the province of the jury, to try the case according to the law and the evidence. They are the real experts, in all matters of fact. The evidence should be placed before them, as were the papers in this case, and they should be permitted to make their own deductions; nor should the mere opinions of any set of men be suffered to go before them as evidence, to affect their decisions. A different rule would bring about the greatest absurdities. It would be, in many cases, constituting a different body to try the case, by whose decision or opinions, the jury were to be entirely controlled, and would amount virtually to a denial of the right of trial by jury.

We think it unnecessary to discuss the second objection raised in the bill of exceptions, marked "1," in regard to the inadmissibility of these papers as a basis of comparison, after the witness had stated that he was acquainted with the handwriting and signature of defendant, and the object of plaintiff being to prove the document "A" to be defendant's handwriting. The acquaintance of witness with the handwriting of defendant, was certainly the best evidence, and they should not have been permitted to decline that, and resort to an inferior grade of evidence.

In regard to the third and last objection, raised in the bill of exceptions last referred to, in regard to the inadmissibility of the document marked "A" under the pleadings, we would simply suggest, that no allegation was made in the petition, charging the defendant with giving a pass to the slave; yet upon the trial, such an instrument was suddenly introduced, and sought to be made, as it were, the basis of the action. We contend, that a distinct charge should have been made in the petition, of the pass having been furnished, in order to have guarded the defendant against surprise, caused by its introduction.

Another bill of exception was taken by plaintiff, against the ruling of the court below, refusing to allow the proposed test of the accuracy of the knowledge of witness *Miller*, in regard to the handwriting of defendant. The reasons assigned by the court for its decision upon this point, are of sufficient force to render any remarks of ours unnecessary. The test was one certainly unknown to the law, and would lead to the inconveniences and absurdities suggested by the court.

By the court:

SLIDELL, J. The petition alleges in substance, that the defendant enticed, harbored, and carried away a slave belonging to the plaintiff, with the intention of depriving him of his property, and claims damages to the amount of the value of the slave. There was a verdict and judgment for the defendant in the court below, and the plaintiff has appealed.

The most material matter to be considered in the present condition of the cause is, the ruling of the district judge on a question of evidence. When the negro was apprehended, after his disappearance from his master's abode, by the officers of a steamboat on board of which he was, a paper purporting to be a pass, signed *Moses Smith*, was in his possession, and was produced by him. It was necessary for plaintiff's case, to prove, that this document was in the handwriting of the defendant. In order to do so, the plaintiff offered in evidence a number of documents satisfactorily proved to be written and signed by the defendant. Two of them are judicial bonds executed by the defendant. One of them was executed in this cause, for the purpose of bonding the property attached; the other in a criminal proceeding against *Smith*, on a charge

of enticing away the slave in question. These documents having been offered in evidence with the permission of the court, which, we think, was properly allowed; the plaintiff then, as the bill of exceptions states, "called the clerk of the court, a person said to be skilled in the knowledge of handwriting, and was proceeding to ask him to compare the handwriting of said documents, with the handwriting of the document called a pass, and to state to the court and jury, whether or not, they were, in his opinion, written by the same hand; to the reception of which evidence, defendant, by his counsel, objected, on the ground, that the law did not permit a party to call witnesses to prove a handwriting by comparison, except in the cases provided for in the article 325 of the Code of Practice, and of the Civil Code, 2241, which objection was sustained by the court."

In support of the ruling of the district judge, the appellee has invoked the general principles of evidence, the opinions of English and American commentators, and the decisions of learned judges in the courts of England, and of our sister States. If we were permitted to decide the question upon these authorities, its investigation would be interesting, and its solution difficult; for there is certainly diversity of opinion, as may be seen by consulting the elaborate note to Mr. Phillips' Treatise on Evidence, ed. of 1843, vol. 4, page 1326 to 1331. No one can peruse, even cursorily, the learned and acute disquisitions which this and kindred questions have elicited, without acknowledging, that the subject is surrounded with difficulties, not only in the abstract, but in reference to practical results in the administration of justice.

But we are not permitted to look to those sources, being of opinion, that the question is settled in the decision of our own courts, based upon our own legislation.

Under the code of 1808, p. 306, art. 226, it is said, "that a signature may be proved by at least one credible witness declaring positively that he knows the signature, as having seen the obligation signed by the person from whom or from whose heirs the payment or execution of it is demanded, and if there be no such deposition, the signature of the person must be ascertained by two persons having skill to judge of handwriting, appointed by the judge before whom the cause is pending, which two persons shall report on oath, whether the signature appear to them to be that of the person whose it is alleged to be, on their having compared it with papers acknowledged to have been signed by him."

By the amendatory code of 1825, the principle of comparison as a means of arriving at truth, was preserved, but with an enlarged applicability. "If the party disavow the signature, or the heirs or other representatives declare, that they do not know it, it must be proved by witnesses or comparison, as in other cases." Art. 2241.

In the subsequently adopted Code of Practice, it is said: "If the defendant deny his signature in his answer, or contend that the same has been counterfeited, the plaintiff must prove the genuineness of such signature, either by witnesses who have seen the defendant sign the act, or who declare that they know it to be his signature, because they have frequently seen him write and sign his name. But the proof by witnesses shall not exclude the proof by experts, or by a comparison of the writing, as established by the Civil Code. Code of Practice, art. 325.

Under the above legislation, we believe it has been a matter of frequent practice to prove signatures by means of comparison with other documents signed

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by the party against whom the proof is to be made, whether such other documents are authentic or their genuineness is first satisfactorily proved. The decisions from an early period to the present time, are in harmony with that practice. Thus in a very early case, *Sauvé v. Dawson*, 2 M. R. 203, decided in 1812, in order to prove the signature of the defendant to a promissory note, the plaintiff offered an appeal bond, executed by the defendant, as a basis for comparison, and the signature to the note was allowed to be proved by a comparison with the signature to the appeal bond. In *Bell v. Norwood*, 7 L. R. 103, the court recognized the right of a party to contradict the testimony of a witness who had sworn positively to the genuineness of a signature, by the testimony of witnesses who had compared it with other documents on file in the cause, although they were of opinion that their negative statements did not outweigh the direct affirmative oath of the first witness, who saw the note signed. In the case of the *City Bank v. Foucher*, 9 L. R. 410, the modes of proof provided for by the code are spoken of as not exclusive, but concurrent. In *Plisque v. Labranche*, 9 L. R. 522, Judge Martin observes, "proof by comparison of handwriting, or by experts, is admissible where the defendant denies his signature," referring to articles 324 and 325 of the Code of Practice. In *Ball's Administrators v. Ball*, 15 L. R. 179, the signatures of an instrument not being certified in due form, were permitted by the judge below to be proved by comparison of handwriting with other signatures of the same parties to notarial acts, and the Supreme Court sustained the ruling below, referring to the Civil Code, 2241; Code of Practice, 325; 2 M. R. 203; 3 Ib. 359. See also 19 L. R. 541, *Davis v. Police Jury*.

But it is said that the articles of the code refer only to cases where the instrument is the immediate basis of the action, as in the case of a suit upon a promissory note, or bond signed by the defendant, who denies his signature. In this view we do not concur, and it is in opposition to the ruling in *Ball's* case and *Davis'* case already cited. In those cases the documents to be proved were not the immediate basis of the action, but were introduced as matters of evidence upon incidental questions. The reason of the rule of evidence is as strong in one case as in the other.

We are therefore of opinion that the comparison and testimony proposed, as set forth in the bill of exceptions, should have been permitted; but, at the same time, we think it proper to say that such testimony should be considered and acted upon by a jury with much caution, and that they are not bound to surrender their own opinions, formed by their own comparison, to the opinion of witnesses however experienced.

There are some other points to which it is proper to advert, in remanding the cause.

We think the testimony as to the declarations of the negro, were properly rejected on the ground of hearsay.

We are also of opinion that the objection to the admission of certain evidence, upon the ground of the vagueness of the allegations in the petition was properly overruled, the petition, taken as a whole, being sufficiently definite.

We think the court might have appointed experts as requested by the plaintiff, but we are of opinion that their report would not have been conclusive upon the jury, who would only be bound to give their report such weight as they might think it entitled to.

We are of opinion that the attachment should have been dissolved, this being clearly a case of damages claimed *ex delicto*. *Prewitt v. Carmichael*, 2 Ann. 943.

It is therefore decreed, that the judgment of the district court be reversed, and that this cause be remanded for a new trial, the defendant to pay the costs of the appeal. It is further decreed, that the attachment issued in this case be dissolved, and that the plaintiff pay the costs of issuing and executing the attachment.

## STATE v. HOLMES.

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Section 35 of the Act of May 4, 1805, does not require that a copy of the indictment, and a list of the jury which are to pass on the trial of the accused, should be delivered to him before arraignment. It requires that they should be delivered to him two entire days before trial.

The proper time for the prisoner to make the objection, that he has not been served with a copy of the indictment, is when he is called up for trial, and his not doing so at that time will amount to a waiver of a copy of the indictment.

**A**PPEAL from the District Court of the Parish of Caddo. This case was tried by a jury before *Bullard, J. Morrison*, for the State. *Hodge and Buckner*, for defendant. By the court:

**DUNBAR, J.** The defendant, indicted for murder, was found guilty by a jury as charged in the indictment, without capital punishment, and has been sentenced to hard labor in the penitentiary during life.

This case comes before us upon motions for new trial, arrest of judgment, and several bills of exceptions.

The defendant, upon his arraignment, stood mute, whereupon it was ordered by the court that the plea of not guilty be entered for him, which was accordingly done. It appears that at the time there had not been a copy of the indictment served upon the prisoner; and it is now contended that for this reason a new trial should be awarded to him. We think not. The Act of 1805, p. 440, sec. 35, requires "that every person who shall be accused and indicted for any capital crime, or any crime punishable with imprisonment at hard labor for life, or for seven years or upwards, shall have a copy of the indictment and list of the jury which are to pass on his trial, delivered unto him at least two entire days before he or she shall be tried for the same;" but does not require that this should be done before arraignment.

It is next urged, that a true copy of the indictment was not served on the prisoner two days before his trial, the copy which was served on him not having the endorsement, by the grand jury, of "a true bill," written thereon, as in the original.

We are not of the opinion that this objection can avail the prisoner, because when he was called up for trial, upon being asked if he was ready, "his counsel said he was not ready, but offered no motion for a continuance, and said he should interpose no obstacle to the trial, but would reserve all legal objections to the proceedings. Whereupon the court ordered the trial to proceed."

This was the proper time to have made the objection, that the prisoner had not been served with a copy of the indictment; and his not having done so was a waiver of a copy of the indictment, if, indeed, one had not been previously served on him, of which we are by no means satisfied by the evidence, but are rather inclined to believe that a true copy of the indictment had been served on him, in conformity to law. *State v. Hernandez*, 4 Ann. 379.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

## DUBOSE v. ELIZABETH HALL et uxOR.

A plaintiff who brings an action for the resolution of a sale, on account of the non-payment of the price, after having brought suit upon one of the notes given in payment of the price, may, at any time before going into the trial, discontinue one of the actions, and proceed with the other. The suit upon the note will be a sufficient putting in *mora*, and its effect will not be impaired by the discontinuance.

He who sues a married woman, must allege and show, that she is separate in property from her husband, by marriage contract or by a judgment of court, as the case may be, and without that showing, he will not be able to maintain his suit against her personally, or charge her separate estate.

**A**PPEAL from the District Court of the Parish of Morehouse, *Copley, J. Parsons*, for plaintiff. In the dissolution of a sale, the parties ought to be placed in the same situation that they were before the contract was made. The vendor is entitled not only to the recovery of his property, but it should be restored to him free from any incumbrances or charges, whether for improvements or anything else. *Derepas v. Shallus*, 15 L. R. 371. *Bonerv v. Mahle*, 3 Ann 600. 6 Ann. 2. Pothier on Sale, No. 476. Domat, Nos. 421, 555.

Defendant failing to comply with the terms of the contract, and having been put in default by a judicial demand, became a possessor in bad faith, and is not entitled to pay for improvements, but is liable for rents and revenues. *Williams v. Booker et als.* on a re-hearing, 12 R. R. 256.

*Robertson and Boatner*, for defendants, cited Code of Practice, art. 149, 334. C. C. art. 2265. 11 L. R. 108. C. C. arts. 2271, 2372, 2373. 6 R. R. 64. 5 Ann. 173. 5 Ann. 586. 5 Ann. 405. 1 R. R. 34. 3 Ann. 326. 13 L. R. 337. 8 M. R. 705. 7 R. R. 173. 11 L. R. 80. 1 N. S. 312. 1 L. R. 310. 17 L. R. 97. 9 R. R. 351.

By the court:

Rost, J. This is an action for the resolution of a sale, on account of the non-payment of the price.

The defendants excepted to the action on various grounds. The district judge overruled the exceptions, and they have appealed from the judgment rendered against them on the merits.

The plaintiff had brought a suit upon the first note given to him in payment by the defendants, which was still pending when the present action was instituted. The defendants pleaded the action on the note, in bar of the other. In answer to that exception, it is only necessary to refer to the case of *Adam v. Lewis*, 7 N. S. p. 404, in which it was held, under a similar state of facts, that the plaintiff may, at any time before going into the trial, discontinue one of the actions, as was done in this case, and proceed with the other.

We think that the defendant was put in *mora* by the suit commenced against her, for that portion of the price which had matured; that as she did not comply with the prayer of the petition, the subsequent discontinuance of the suit did not impair the force and effect of the demand. The exception that she had not been put in default, was therefore also properly overruled.

We are of opinion that the fourth exception was well taken. The plaintiff should have alleged and shown, that *Mrs. Hall* was separate in property from her husband, by marriage contract, or by a judgment of court, as the case may be, and without that showing, he could not sue her personally, or charge her separate estate with the damages he claims.

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As, however, it would seem from the answer filed to the merits by the defendant, that she had the right to contract as a *feme sole*, we have come to the conclusion, to remand the case for further proceedings, with leave to the parties to amend.

We deem it proper to state, that we are satisfied that the subject matter of the sale was not a tract of land, but merely a settlement right, and that the warranty to the defendant should be construed with reference to the thing sold.

It is ordered, that the judgment in this case be reversed, and the case remanded for further proceedings, with leave to both parties to amend; the cost of this appeal to be paid by the plaintiff and appellee.

### JAMES GATES, for Use, &c., v. RENFROE et al.

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Plaintiff was one of two sureties upon a note made in Georgia, and placed in the hands of a trustee. He afterwards paid the note and brought this suit against his co-surety and the maker of the note. *Held*: That, the plaintiff having paid, without being sued, and without informing the principal debtor, no equity exists in his favor; and the case must be determined as if the trustee himself was seeking to enforce the trust against the defendants. C. C. 3025.

Minor children, as long as both parents are living, are subjected exclusively to the authority of the father, who administers their property, and who is bound to provide for them and to protect them in their persons and rights.

He may delegate a part of the paternal power to the teachers he employs to educate them, but he cannot permanently divest himself of any portion of it by contract.

There may be cases in which a court of justice would be authorized to take away this power.

Trusts are unknown to our laws, and the only cases in which they have ever been enforced by our courts, are those of marriage settlements, which, so far as they create no new tenure of property, have been, by comity, assimilated to marriage contracts.

**A** PPEAL from the District Court of the Parish of Caddo, *Jones, J. Roydon and Spofford*, for plaintiff. *Terrell and Hodge*, for defendants. By the court:

**ROST, J.** The plaintiff, who is a citizen of the State of Georgia, sues for the use of *James W. Howard*, and seeks to recover from *Campbell Renfroe* and *Josiah Renfroe*, whom he alleges to be residents of the parish of Caddo, the sum of \$700 and interest, which he alleges he paid for them as surety on a note which they had given to one *Isam B. Troutman*, for a valuable consideration, which note they failed to take up at maturity.

The facts of this case are novel in their character. In 1847, *Campbell Renfroe* lived in Georgia with his wife and children. His father-in-law brought suit against him for the board of his family; and his wife sued him at the same time, for alimony and a divorce. He proposed to compromise these suits, by securing \$700 to be settled upon his two children for their support. The proposition, it seems, was accepted. The note sued on was executed and placed in the hands of *George R. Hunter*, selected by the parties as trustee, in place of *Troutman*, who refused to serve. The note is signed by *Campbell Renfroe* as principal, and by *Josiah Renfroe* and *James Gates* as joint and several sureties. It was not paid by *Campbell Renfroe*, at maturity, and the plaintiff afterwards gave his note in place of it to the trustee, who has testified that the note thus given has been paid.

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v.  
RENFROE.

The defendant resists the claim of the plaintiff on the ground that the note was originally given without consideration, to his knowledge, and that he obtained possession of it by fraud, after it became due, and also without consideration.

There was judgment for the plaintiff against *Campbell Renfro* for the amount paid by him, with interest and costs, and against *Joseph Renfro* for one half of said amount and interest, and all the costs. The defendants have appealed.

The plaintiff having paid without being sued, and without informing the principal debtor, no equity exists in his favor. And the case must be determined as if the trustee himself was seeking to enforce the trust against the defendant. C. C. 3025.

There is nothing in the record to show the validity of the original contract, under the laws of Georgia, unless it be authorized by some statute of that State. Our impression is, that it can no more be sustained under the common law than under our own; and that it implies such a delegation of paternal power to a third person during the existence of marriage, which neither system of jurisprudence recognizes. We believe that there, as with us, minor children, as long as both parents are living, are subjected, exclusively, to the authority of the father, who administers their property and is bound to provide for them and to protect them in their persons and rights. He may delegate a part of the paternal power to the teachers he employs to educate them, but he cannot permanently divest himself of any portion of it by contract. There may be cases in which a court of justice would be authorized to take away their power from them, but the present is not one of that class.

As at present advised, we are of opinion that there was no legal obligation upon the defendant to pay the note he gave. If we are in error in this, our decision must still be against the plaintiff, on the ground that trusts are unknown to our laws, and that the only cases in which they have ever been enforced by our courts, are those of marriage settlements, so far as they create no new tenure of property, which have been, by comity, assimilated to marriage contract. See *Harper v. Stansborough*, 2 Ann. 377. *Succession of Franklin*, 7 Ann.

It is ordered that the judgment in this case be reversed, and that there be judgment for the defendants; the plaintiff paying costs in both courts.

SLIDELL, J. Upon a question dependent on a foreign jurisprudence, we must necessarily speak with much diffidence. My impression is that this action could not have been maintained in Georgia.

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| 7   | 570 |
| 45  | 361 |
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| 105 | 745 |
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| 108 | 211 |
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| 110 | 478 |

### KING and GERSON v. W. J. Q. BAKER.

Under article 626 of the Code of Practice, orders of execution must be sealed with the seal of the court.

A surety upon a delivery bond taken under the statute of 1842, may avail himself of the defect, that there was no seal of the court upon the execution in the hands of the sheriff at the time the bond was taken.

A surety upon such a bond may avail himself of all the means of defence of his principal, which do not result from the condition or personal incapacity of the principal.

A surety cannot be bound, as a general rule, under more onerous conditions than his principal.

The rule that, in whatever manner a party chooses to bind himself, he shall be held to be bound, does not apply to judicial bonds. In such cases a sheriff has no power to take any other bond than that which he is authorized by law to take.



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v.  
BAKER.

**A** PPEAL from the District Court of the Parish of Ouachita, *Sharpe, J. Garret and Ludeling*, for plaintiffs. No principle of law is better settled than that, a person will not be allowed to deny the truth of judicial admissions made by him. 1 R. R. 544. 9 R. R. 381. 4 Ann. 293. 4 Ann. 416. 5 Ann. 22. 6 Ann. 719. Greenleaf's Ev. sec. 22. A party to a bond cannot object, that it is irregular, or that the sheriff had no right in the property. In whatever manner one thinks proper to bind himself, he shall be bound. 2 N. S. 672, 3 M. R. 569. 4 N. S. 25, 5 M. R. 194. 4 N. S. 122. 6 N. S. 123. 10 M. R. 197. 3 Ann. 234

By executing the bond, the defendant waived all right (if he had any) to object to irregularities or defects existing in the proceedings. 9 R. R. 186. "*Volenti non fit injuria.*"

Sureties are entitled to oppose all exceptions which are inherent to the debt, but not those which are personal to the debtor. C. C. 3037. Poth. Obli. 380-1. 12 M. R. 385. 10 L. R. 415.

*Baker*, for defendant. Even if the execution was properly admitted, it is shown that when the sheriff seized the slaves and took the bond, that the execution was without a seal of court. It was, then, no execution at all. C. P. 626, 724. Plaintiffs acquired no rights under it, nor could any be acquired; no bond could be taken under it; there is nothing for such bond to stand on. All such bonds presuppose a legal execution. If the principal obligation is null, or that upon which it stands is null, the penal clause is also null. C. C. 2109. 6 R. R. 450. *Welch v. Thorne*, 16 L. R. 188. 18 L. R. 166. 5 Ann. 514.

The bond was without a cause. The law only permits the defendants in execution to bond their property. Acts of 1842. p. 210, sec. 2. As to *Mrs. Crownritch* and her security, the bond is a mere *nude pact*. C. C. 1887, 1890. 17 L. R. 118. 5 R. R. 101. 1 Ann. 192.

*Mrs. Crownritch* executed the bond in error of fact, and is not bound, *ignorantia facti excusat*. 10 L. R. 376. The rule, that in whatever way a man binds himself, so is he bound, has no application in this case. *Welch v. Thorne*, 16 L. R. 118. *Ib.* 173. 9 R. R. 535. 4 Ann. 374.

By the court:

ROST, J. The plaintiff brought suit against *W. J. Q. Baker*, on a bond executed by *Ellen A. Crownritch* and the said *Baker*, as her surety, conditioned that certain slaves seized at the suit of the plaintiffs, as the property of *John M. Crownritch*, the husband of the principal in the bond, should be delivered to the sheriff on the day of sale, which bond had become forfeited by the non-delivery of the slaves at the time stipulated.

The defendant resists the payment of the bond on two grounds: 1st. That there was no legal execution in the hands of the sheriff at the time he took the bond. 2d. That the defendant alone had the right to give a delivery bond, and there is no law authorizing the sheriff to take the bond sued upon.

The plaintiffs have appealed from the judgment rendered in the court below in favor of the defendant.

It is proved, that the seal of the court was not affixed to the writ under which the sheriff seized the slaves, and that this defect was only supplied after the bond sued upon had been executed.

It is not denied that, under article 626 of the Code of Practice, orders of execution must be sealed with the seal of the court; but the plaintiffs contend, that the defendant in execution alone can take advantage of the informalities of the proceedings in the suit or under the judgment, and that *Baker* is a stranger to him and should not be permitted to assert his privileges or to dispute the validity of the seizure of his property.

It appears to us, that this argument proves too much. If the principal in the bond represented her husband, and acted in his behalf, her surety was, in fact, the surety of the defendant in execution, and may avail himself of all the means

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of defence of his principal which do not result from his condition or his personal incapacity. A surety cannot be bound, as a general rule, under more onerous conditions than his principal. *Gilbert v. Meriam*, 2 Ann. 160.

If, on the other hand, the principal and surety on the bond are strangers to the defendant in execution, then it is clear that the sheriff had no authority to take the bond, because the act of 1842, under which it was taken, gives to the defendant alone the privilege to retain in his possession the property seized, on executing a delivery bond.

The plaintiffs invoke the rule, that in whatever manner a party chooses to bind himself, he should be held to be bound; but we have uniformly adhered to the decision of our predecessors, in the case of *Slocumb v. Roberts*, that this rule is not applicable to judicial bonds, and that, in such cases, a sheriff has no power to take any other bond but that which he is authorized by law to take. 16 L. R. 174.

The judgment is affirmed, with costs.

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### WOLFE v. PRUITT.

An application for a new trial on the ground of surprise, will not be listened to, unless the party applying shall have used due diligence.

**A**PPEAL from the District Court of the Parish of Morehouse, *Copley, J. McGuire and Ray*, for plaintiff. *Robertson and Boatner*, for defendant. By the court:

SLIDELL, J. The evidence upon which the cause was tried not being presented by the transcript, we are unable to say whether, on the merits, the judgment was erroneous.

An application was made for a new trial, on the ground, supported by affidavit that the defendant was surprised in not being permitted to take interrogatories propounded to plaintiff, as confessed; the clerk, as is asserted in the affidavit, having neglected his duty as to issuing copies of the order to answer, &c.

The defendant obtained an order to answer in April, 1851. In November he filed an application to have the interrogatories taken, as confessed. But he does not appear to have required the action of the court upon it. No action was had, before the trial, upon the application; nor was any motion made for a continuance, so as to give further time to have service made. After trial and judgment, under these circumstances, the district court may well have considered that there was a want of due diligence, and that the application for relief on the grounds stated, came too late. We find no sufficient reasons or precedent for disturbing the judgment.

Judgment affirmed, with costs.

## GEORGE M. SAVAGE v. ELIZA FOY AND HUSBAND.

When boundaries between two tracts of land are fixed and determined by acts of the same date, passed by the mutual vendors of the claimants, more than a quarter of a century before the existence of any controversy, and acquiesced in by all parties for that long period of time, they must remain undisturbed.

When an owner has alienated one or two estates which belonged to him, and the property, or any part of it, is contested, the limits assigned to it by the vendor at the time of the sale, must be consulted. The limits anciently subsisting between the two estates must not be regarded, because the designation which the vendor makes of the metes and bounds, forms new limits between the two estates, or between the parts of them which he has sold. C. C. 840.

In this case the plaintiff joined a claim for the price of a slave to his action of boundary. *Per Curiam*. We do not wish to be considered as approving such an impropriety in pleading as this; but considering that substantial justice has been done in this branch of the case, by the judgment of the district judge, we shall not disturb it.

**A** PPEAL from the District Court of the Parish of Ouachita, *Sharpe, J* *McGuire and Ray*, for plaintiff. *Baker and Morrison*, for defendants. By the court:

DUNBAR, J. This is an action of boundary. The plaintiff claims title under various mesne conveyances from *C. and C. A. Betin*. On the 14th December, 1825, *C. and C. A. Betin* sold two hundred and fifty arpents of land on the Bayou de Siard, to *Thomas Friend*, by certain metes and boundaries, with a plat of survey made by *James McLauchlin*, surveyor of the parish of Ouachita, on the 8th of December of the same year. On the 10th July, 1828, *C. A. Betin* sold to *John T. Faulk* four hundred arpents of land on the said bayou, adjoining on the lower side the land first above mentioned, sold by *C. and C. A. Betin* to *Thomas Friend*. These two tracts, making together the quantity of six hundred and fifty arpents, were at one time held in common by the defendant, *Eliza Foy*, then widow of *Peter J. Evans*, and *Nancy Miriam Evans*, the sole heir of *Peter J. Evans*. After the death of *Peter J. Evans*, and marriage of the said *Nancy Miriam* with the plaintiff, the defendant, *Eliza Foy*, sold her undivided half of said land to the said *Nancy*, her daughter, and the plaintiff, *George Savage*, claims title to the same, under the last will and testament of his deceased wife, the said *Nancy Miriam Evans*.

The defendant claims title to the lands adjoining those above described, under various mesne conveyances from the same vendors, *C. and C. A. Betin*, who the same day and year that they sold to *Thomas Friend*, as before mentioned, sold to *A. H. McCommack* one hundred and fifty arpents of land, by certain metes and boundaries, with a plat of survey made by *James McLauchlin*, on the 8th December, 1825. And under various mesne conveyances, the defendant claims title also from the heirs of *Breville Breard*, to three hundred and forty arpents of land, making in all five hundred and fifty arpents.

Plaintiff's counsel contends, that as it is shown by the evidence that the defendants are in actual possession of eight hundred and thirty-five arpents of land, being the whole of the *Breard Breville* tract of four hundred arpents, the whole of the *M. J. S. Breard* tract of four hundred arpents, and thirty-five arpents of the *Charles Betin* tract, as they appear on the township map, in

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evidence in this cause, when their titles call only for five hundred and fifty arpents, they should not be allowed to retain the overplus, and that it should be given to the plaintiff, who has not by that exact quantity, what his titles call for.

It is further admitted by the counsel of defendants in argument, that there is enough land to satisfy all claimants under the three confirmations before mentioned to *Charles Betin, M. J. S. Breard, and Breard Breville*. But we do not see how it is in our power to alter the special locations and boundaries made in the deeds from the *Betins* to *Thomas Friend* and *A. H. McCommack*, to be found on the plats before referred to, as annexed to said deed. *W. W. Farmer*, a witness who surveyed these lands, and made a plat thereof, which is in evidence, says, that the calls in the deeds and plats correspond, as he found them on the land, and he had the deeds with him. *Sterling*, another witness, says that *P. J. Evans*, (through whom the plaintiff claims) never had in possession any part of the *McCommack* tract, and that *Thomas Friend* and *A. H. McCommack* settled on their tracts of land in 1825 or 1826, about twenty-two years before their suit was brought.

We consider that the plaintiff cannot go behind the deeds from the *Betins* to *Thomas Friend* and *A. H. McCommack*. The boundaries between these two tracts of land being fixed and determined in these acts, passed by their mutual vendors at the same date, more than a quarter of a century since, and acquiesced in by all parties for that long period of time, must remain undisturbed.

We are further of opinion, that the plaintiff is estopped from claiming other boundaries than those mentioned in these deeds, and in conformity to which, there has been such long and undisturbed possession. *Zeringue v. White*, 4 Ann. 301. There is, moreover, a positive provision of the Civil Code on the subject, which declares, that "when an owner has alienated one or two estates which belonged to him, and the property of any part of it is contested, the limits assigned to it by the vendors at the time of the sale, must be consulted. The limits anciently subsisting between the two estates must not be regarded, because the designation which the vendor makes of the metes and bounds, forms new limits between the two estates, or between the parts of them which he has sold." C. C. art. 840.

The plaintiff has joined in this action of damage, a claim for the price of a slave. We do not wish to be considered as approving such an impropriety in pleading as this; but considering that substantial justice has been done on this branch of the case by the judgment of the district judge, we shall not disturb it. We think that the compromise entered into between the plaintiff and defendant, settled all such matters between them as the payment in error complained of.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs; reserving to the plaintiff any claim he may have against his vendor, the defendant, by reason of any deficiency in the land sold.

VAIDEN *v.* ABNEY.

When a continuance is refused by a district judge, the Supreme Court will not disturb the judgment rendered, even when the correctness of the particular ground on which the judge *a quo* placed his refusal, is doubtful, provided the court be satisfied that there was another valid ground for the refusal of the continuance, presented by the party opposing it.

The rule, that on an application for a continuance, due diligence should be shown, is well settled.

It is equally clear, that a party's assertion that he has used due diligence will not be heeded, when his *laches* are patent upon the record.

**A** PPEAL from the District Court of the Parish of Bossier, *Bullard, J. Crain and Jones*, for plaintiff. *Lawson and Fuller*, for defendant. By the court :

SLIDELL, J. The defendant complains that a continuance was improperly refused by the district judge, and asks that the cause be remanded. When a continuance is refused by a district judge, we are not disposed to disturb a judgment rendered, even if we doubt the correctness of the particular ground on which the judge placed his refusal, provided we are satisfied there was another valid ground for the refusal of the continuance, presented by the party opposing it. In the present case, one of the grounds upon which the plaintiff opposed the continuance was, that the defendant had not used due diligence to obtain the testimony of the witness, for the purpose of obtaining whose testimony, the defendant desired further time. We think the want of due diligence was manifest. This cause was put at issue in August, 1848. In May, 1851, the defendant applied for a continuance, in order to obtain the testimony of a witness, on commissions. In May, 1852, when the cause, after this long delay, came to trial, the application for continuance which we are now considering, was made. The defendant states in his affidavit, that he took out a commission in February, 1852, and sent it to Alabama, but it has not been returned. He does not explain why he waited so long before taking out the commission, nor what measures he took to procure its execution; nor does he give any reasonable excuse for all his antecedent negligence. If, under such circumstances, defendant can obtain continuance, litigation would be endless.

The rule, that on an application for continuance, due diligence should be shown, is too well settled to require comment. It is equally clear, that a party's assertion that he has used due diligence will not be heeded, where his *laches* are patent upon the record.

Judgment affirmed, with costs.

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WILLIAM J. KYLE, Administrator, *v.* H. VAN BIBBER.

Testimony that is irrelevant or secondary, will be excluded.

The testimony of a witness who has omitted to answer a cross-interrogatory, will be excluded.

The court cannot disregard a judgment obtained in Alabama, because the proceedings previous to judgment, if tested by our laws, would be irregular.

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VAN BIBBER.

When the defendant has been personally cited, the court is bound to presume that the subsequent proceedings and judgment are regular and in conformity with the laws and practice of the place where the judgment was rendered.

The court understands that, in Alabama, it is requisite to relief in chancery, by opening a judgment, that the complainant should show that the judgment is unjust.

**A**PPEAL from the District Court of the Parish of Caddo, *Bullard, J. Crain and Jones*, for plaintiff. *Lawson and Fuller, and Gilbert and Landrews*, for defendant. By the court:

SLIDELL, J. This is an action by the plaintiff, in his capacity of administrator of the estate of *Thomas C. Dupree*, deceased, upon a judgment obtained by him in that capacity, in Alabama, against *Van Bibber*, defendant in a proceeding in garnishment there upon a judgment obtained by said administrator against *William J. Campbell*. The cause was tried by a jury, who found a verdict for the plaintiff, and from a judgment thereon rendered, the defendant has appealed.

The record teems with bills of exception, which we shall briefly notice. The first is to the refusal of the judge to permit the defendant to file an amended answer. A portion of the matter set up in this answer had been substantially pleaded in a previous answer, and, so far, the amended answer was superfluous.

That portion of the averments in the amended answer which was new, amounts in substance to an attempt to inquire into the administration by *Kyle*, as trustee of the creditors of one *Stringfellow*, of certain trust funds assigned by *Stringfellow* to *Kyle*, for the benefit of his creditors, of whom *Van Bibber* was one, and to show that in that capacity he had come into possession of property sufficient to cover *Van Bibber's* claim, after satisfying certain preferred creditors, and retained the same in satisfaction of *Van Bibber's* claim. That claim, it is alleged in the answer, was held by *Van Bibber* for the benefit of *Campbell*, and its being so held was, as he alleges, the occasion and subject of the garnishment.

It was, perhaps, a sufficient reason for the refusal of leave to file this answer, which is loose and uncertain in its averments, that it attempted to blend the affairs of *Dupree's* succession with the administration of a trust fund held by *Kyle* in an entirely different capacity. But we find an additional reason for not disturbing the ruling of the district judge in the antecedent proceedings in this cause. The proposed amendment presents new and complicated issues. It was not offered until the April term, 1852, two days before trial. The cause had been put at issue in May, 1848. The prolix answer, then filed, and the interrogatories then propounded to the plaintiff, authorize the inference, that if the matters set up in the amended answer were true, they were then within his knowledge. In view of this long silence and *laches*, to reverse the judgment now, and remand the cause to enable the defendant to amend, would be a very dangerous precedent. It will also be observed, that the judgment of the district judge does not preclude the defendant's recourse against *Kyle*, as trustee of *Stringfellow's* creditors.

The testimony of the witness *Cox*, in answer to one of the interrogatories propounded by the defendant, was properly excluded on the ground of irrelevancy to the issue. It was also objectionable on the ground of its being secondary evidence.

The testimony of an attorney at law in Alabama, examined under commission, was properly excluded on the ground of his having omitted to answer a cross-interrogatory. If this testimony, however, had been admitted, it would not, in our opinion, have authorized a different judgment. The professional

opinion which the witness gives is entitled to little weight, from the loose manner in which he treats the subject.

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What we have said as to the testimony of *Cox*, and the amended answer, disposes of the question as to the rejection of *Yarborough's* testimony.

The proposition, that we have a right to disregard the Alabama judgment, because the proceedings in garnishment would be irregular, if tested by our own laws, is utterly inadmissible. The defendant appears, from the record, to have been personally cited. We are bound to presume that the subsequent proceedings and judgment were regular, and in conformity to the laws and practice of Alabama.

It is said that the record exhibits an entry which shows that the judgment had been satisfied, and, consequently, that the subsequent judgment against the garnishee was erroneous. The facts pertinent to this point are as follows: On the execution docket in the office of the County Court of Coosa county, Alabama, which is stated by a witness to be one of the records of that court, in the case of *Kyle, administrator, v. Campbell*, there is the following entry: "Received, the amount of this case, principal and interest, by order of *Wm. J. Campbell*, on *Henry Van Bibber*, for the amount of the judgment, interest and costs, March, 18th, 1839, which discharges defendants. (Signed,) W. S. KYLE."

It appears that garnishee process issued against *Van Bibber*, in January, 1839, and was served upon him in February, 1839. In January, 1840, there was judgment *nisi* against him upon default, and he was notified to appear on the ensuing July term, and show cause why final judgment should not be entered. Service of notice of the judgment *nisi*, and to appear, was served upon him in May, 1840, and, at the July term, 1840, final judgment was entered. If the entry on the execution docket was an obstacle to the rendition of judgment against the garnishee, it seems to us that the matter was one from which the defendant should have sought relief by writ of error. If, however, as is asserted by the defendant's counsel, this matter was one which a court of chancery in Alabama could have taken cognizance of, in support of which point we have not been favored with authority, it seems to us clear, that a court of chancery would not have disturbed the judgment if the showing made in this cause by the plaintiff's answers to interrogatories, put to him by the defendant, were made before such a court. These answers show, that on the 18th of March, 1839, *Campbell* gave *Kyle* a written order upon *Van Bibber*, in which he says: "You will please pay over to *W. J. Kyle*, the sum of eight hundred and sixty-nine dollars and forty-six cents, being the amount settled upon between me and the said *Kyle*, in the case of the execution in which you are garnished: and oblige, &c.;" that the plaintiff exhibited this order to *Van Bibber*, who verbally accepted it, and said he would pay it; that upon *Van Bibber* asking him whether he should go to court to assent to the garnishment, he told him that it was unnecessary, for that judgment would be entered against him for the amount of his indebtedness, whether he went or not, unless it was previously paid by settling the order, and that it would only be an additional expense to attend court, but that he might go or not as he chose, that judgment would be rendered against him.

From the whole tenor of these answers, which are full—bear the appearance of truthfulness—and satisfied the jury; it is obvious that the plaintiff did not intend to relinquish his proceedings against the garnishee; that *Van Bibber*, did not understand them as being relinquished; that the judgment against the garnishee was fairly obtained, and did no more than determine judicially a liability which

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the defendant clearly assumed to the plaintiff. We understand that in Alabama it is requisite to relief in chancery, by opening a judgment, that the complainant should show that the judgment is unjust. It is unnecessary, therefore, to inquire what other requisites there are, to obtain relief in equity in Alabama, against a judgment rendered there in a court of common law. See the case of *Crafts v. Dogh*, 8 Alabama Rep. 767.

The judgment of the district court is affirmed, with costs.

### GEORGE W. COPLEY v. BONNER et al.

When the sheriff finds the judgment too vague and uncertain to enable him to execute a writ of possession, he cannot have recourse to the examination of witnesses. As was held in the case of *Williams v. Kelso*, 7 L. R. 408, that would be a new trial of the case before the sheriff.

When one sues for the possession of real property, in order to obtain a writ of sequestration, he must allege that he has been evicted, through violence, or that he has reason to apprehend that the defendant will make use of his possession to dilapidate or to waste the fruits of the property. C. P. 275.

In possessory actions, when possession is claimed under title, and the calls of the title are not natural, or at least visible and fixed, a survey of the land is of great assistance to a proper determination of the extent of the possession.

**A** PPEAL from the District Court of the Parish of Morehouse, *Sharp, J. Morrison*, for plaintiff. *Baker*, for defendant. By the court :

ROSE, J. This is a possessory action. The defendants severed in their defence, and separate verdicts were rendered against them. They have both appealed from the judgment rendered on the verdicts.

The judgment is, that the plaintiff be quieted in the possession of his property as claimed.

The appellants contend, that as it does not describe the property, the only legal mode to render it certain is by reference to the pleadings, and that as the description in the petition is extremely vague and uncertain, the judgment cannot be executed, and the case should be remanded. They rely in support of that position, on the cases of *Williams v. Kelso*, 7 L. R. 408, and 3 Mart., N. S. p. 7.

The description in the petition is as follows : "All that certain piece or parcel of land lying north and west of said road descending the Bayou Bartholomew, commencing at and where the road now leaves the bayou, just below the camp ground, and running down said road to where it strikes the Bayou Bartholomew below, about three-fourths of a mile, more or less, so as to include the small improvements made by *Wm. P. Theobald* and *John Perkins*, and to include all the land in the bend of the bayou north and west of said road, together with that under fence and now in cultivation by *A. D. Peck*, in corn ; together with all the possession and right of possession of the defendant, in the case of *George W. Copley v. A. D. Peck*, of all that tract of land lying west of said road, in the bend of the bayou, cultivated and uncultivated, improved and unimproved."

This description appears to us vague and indefinite. The designation of the starting point where the road leaves the bayou, as well as the location and extent of the improvements of *Theobald* and *Perkins*, are undoubtedly so. How is



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the sheriff to ascertain from the copy of the judgment and of the petition, which are alone to guide him in executing the writ of possession, that the road and the improvements he may find, are the same which existed when the petition was filed? He could not ascertain this without the declaration of both parties to the suit, or in default of it, without examining witnesses, which, as the court held in the case of *Williams v. Kelso*, would be a new trial of the case before the sheriff.

Believing that the judgment cannot be executed, we are of opinion that the case must be remanded for further proceedings.

Writs of injunction and of sequestration were issued in this case. We are of opinion that the plaintiff did not make out a case for a sequestration. He does not allege that he has been evicted through violence, or that he has reason to apprehend that the defendants will make use of their possession to dilapidate or to waste the fruits of the property. C. P. 275. We deem it proper to state that in possessory actions, where possession is claimed under title, and the calls of the title are not natural, or at least visible and fixed boundaries, a survey of the land is of great assistance to a proper determination of the extent of the possession.

It is ordered, that the judgment in this case be reversed. It is further ordered, that the sequestration sued out in this case be set aside and avoided. It is further ordered, that the case be remanded for further proceedings, the plaintiff paying the costs of this appeal and of the sequestration.

### WILLIAM LONG v. MARTIN, Curator, and PAXTON.

The question being whether the defendant was a *bond fide* purchaser, the fact that he employed counsel, and that the records were examined, and that he did not take a notarial act of sale, which, in the usual course of business, is accompanied by a mortgage certificate, (C. C. 3398,) but that he took a private act of sale, is a circumstance calculated to excite suspicion.

**A**PPEAL from the District Court of the Parish of Claiborne. This case was tried by a jury before *Jones, J.* *Garrett*, for plaintiff. *Lawson and Scott*, for defendant. By the court:

**SLIDELL, J.** After a careful perusal of the evidence in this cause, we are not satisfied with the verdict and judgment below, and think the justice of the case will be more clearly ascertained, by subjecting it to further examination. We think there is reason to believe, that on further investigation, a larger amount, than was awarded by the jury, will be found due to the plaintiff from the succession of *Bell*. We are also of opinion, that the question whether *Paxton* was a *bond fide* purchaser without notice, should be further investigated. With regard, at least, to a portion of the property, the jury seems to have overlooked the fact, as we understand the evidence, that it was comprehended in a mortgage given by *Long*, acting for the firm of *Bell and Long*, in the year 1836, which mortgage appears to have been duly recorded in the mortgage office. The books of that office were in existence when *Bell*, in his individual name, sold the land and slaves to *Paxton*, although they have since been destroyed. It appears that *Paxton* consulted counsel about *Bell's* title, and the parish records were examined. It is a circumstance calculated to throw doubt over the transaction, that after this examination, the sale was not made by notarial

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act, which would, in the usual course of business, have been accompanied by a mortgage certificate, (Civil Code, 3328,) but by an act under private signature. We point to this circumstance, among others, as one of the considerations which have induced us to remand the cause. We also remark that the district judge, in refusing a new trial, expresses his dissatisfaction with the verdict. There is an obscurity in the case as now presented, arising, perhaps, in some degree, from the destruction of the parish records, which prevents us from coming to a satisfactory conclusion, and which, on a new trial, the parties will have an opportunity of clearing up.

Judgment reversed, and cause remanded; appellees to pay costs of appeal.

### MOSES MADDEN v. WILLIAM W. FARMER.

This suit was brought upon two notes. The defence was prescription. The only evidence of an interruption of prescription, was the testimony of plaintiff's attorney, in whose hands the notes were placed before maturity. A bill of exceptions was taken to the testimony. *Per Curiam*: Attorneys at law are not agents, and the rule which admits the testimony of agents in favor of their principals, in cases like this, should not be extended to them. If it was, this case would not come within the spirit and reason of the rule. There was no absolute necessity for resorting to this evidence, as the same facts might have been proved by an appeal to the conscience of the defendant.

The court will not recognize the principle, that the testimony of an attorney in behalf of his client, makes full proof of the fact sworn to, particularly in cases where the attorney would be personally responsible, if the action was not sustained.

That evidence has always been held, as being of an inferior kind.

**A** PPEAL from the District Court of the Parish of Ouachita, *Copley, J. McGuire and Ray*, for plaintiff. *Richardson*, for defendant. By the court:

ROST, J. This suit is based upon two promissory notes, amounting together to upwards of \$700, besides interest. The notes matured in 1839 and 1840, and the defence is prescription. The only evidence of an interruption of prescription, or of a new promise to pay after prescription accrued, is that of the attorney of the plaintiff, in whose hands the notes have been placed for collection, before their maturity. The defendant objected to this testimony, on the ground, that as the witness had received the notes for collection before their maturity, and had permitted them to become prescribed in his hands, he was liable to the plaintiff, and that the object and effect of his testimony was to relieve him from that responsibility. The objection was overruled, and the testimony admitted. The defendant took a bill of exceptions.

We incline to the opinion, that the objection was well taken, and should have been sustained; attorneys at law are not agents, and the rule which admits the testimony of agents in favor of their principals, in cases like this, should not be extended to them. If it was, this case would not come within the spirit and reason of the rule. There was no absolute necessity for resorting to this evidence, as the same facts might have been proved by an appeal to the conscience of the defendant, which the attorney himself admits, might have been safely resorted to.

If the evidence was admissible, it would be insufficient *per se* to sustain the judgment appealed from. However disposed we may be to believe the testi-

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mony in this instance, we could not recognize the principle, that the testimony of an attorney in behalf of his client, makes full proof of the fact sworn to, particularly in cases where the attorney would be personally responsible if the action was not sustained. That evidence has always been held, as being of an inferior kind, and painful experience has taught us the cause of the discredit into which it has fallen.

Being under the impression that the statement of the witness in this case is correct, we will not close the case against his client.

It is ordered, that the judgment in this case be reversed, and that there be judgment against the plaintiff as of nonsuit, with costs in both courts.

### A. C. BOARDMAN et al. v. SARAH GLENN et al.

From necessity, the agent of a vendee is a competent witness to prove the contract of sale, and the price.

The proceeding by sequestration is a harsh remedy, and when sued out without sufficient cause, the party whose property is taken should have adequate redress.

**A** PPEAL from the District Court of the Parish of Catahoula, *Barry, J.\** *Curry*, for plaintiffs. *Taliaferro*, for defendants. By the court:

**PRESTON, J.** The plaintiffs sue the defendants for a large amount of damages for sequestering their steamboat *Pascagoula*, whilst engaged in a very profitable business. They allege, that she was detained by the sheriff about a month, during which time they lost their business, and incurred great expense.

The defendants allege, that the sequestration was taken out for a lawful cause; that *Roberts*, the master of the boat, against the will and remonstrances of the keeper of a wood-yard for the defendant, *Sarah Glenn*, took a large quantity of pine wood from the yard, for which the boat was liable to seizure, under the act of the Legislature, approved the 15th day of March, 1842. They claimed, by reconvention, the value of the wood, and damages for the trespass.

On the trial, the defendants objected to the testimony of *Roberts*, on the ground that he was liable to the plaintiffs for the damages that might be assessed against them for his trespass. *Greenleaf's Ev.* vol. 1, article —. They were plaintiffs in the reconvention for damages, and did not, by evidence, show any trespass by *Roberts*, which was essential to attack his competency. He believed, at least, that he took the wood in pursuance of a contract, and that there was only a dispute about the price, and we think that was the true state of the facts. He is not a party to this suit, and is not interested in it, as being liable for the price of the wood. Perhaps his interest is, that the defendants should, by their reconvention, recover its full value from the plaintiffs, as they have done, so that by payment he may be exonerated. From necessity, he is a competent witness for the plaintiffs, as to the contract for the wood, and the price. 2 *Greenleaf*, sec. 416. *Nicholson v. Patton*, 13 L. R. 216.

The proceeding by sequestration is a harsh remedy, and when sued out without sufficient cause, the party whose property is taken should have an adequate redress. We are unable to say, from the evidence in this case, that the jury assessed the damages too high.

The judgment of the district court is affirmed, with costs.

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\*Decided in 1851.

## JACOB SMITH v. MARY TABOR et al.

An antichresis, to be binding upon the property pledged, must be reduced to writing in accordance with article 3143 of the Civil Code.

**A**PPEAL from the District Court of the Parish of Caddo, *Jones, J.\* Hodge*, for plaintiff. *Land*, for defendants. By the court:

**PRESTON, J.** At a sale of property belonging to the estate of *James Tabor*, in San Augustine county, in the State of Texas, *Mary Tabor*, one of the heirs, became the purchaser of three slaves, for four hundred and sixty dollars, on a credit of twelve months. She was unable to give the security required as the condition of the sale. The plaintiff, with two other persons, gave the bond for the price of the slaves, which was satisfactory, and the sale was passed to her.

She was then living with the plaintiff, and hired one of the slaves to him to pay two-thirds of the price, being heir of one-third herself.

Shortly afterwards she quit the house of the plaintiff and married *John A. Willis*, who is made a defendant with her. *Willis*, with some friends, went to the house of the plaintiff and took forcible and violent possession of the slave, and sold her to one *Nicholson*.

When the bond became due, the plaintiff paid it. He sues for the amount, makes *Nicholson* a party, and claims that the slave should be restored to him, and that he might retain her until her hire, at \$120 a year, should indemnify him for the amount paid by him for *Mary Tabor* for the price of the slave. He also alleges, that she and her husband were insolvent at the time of the sale to *Nicholson*, and that the latter fraudulently purchased the slave to deprive him of his debt.

The case was submitted to a jury, who found a verdict for the plaintiff for the amount of his claim against *Mary Tabor* and her husband *Willis*, but exonerated the succession of *Nicholson*, (who died during the pendency of the suit,) also the slave *Polly*, from the claim.

The evidence does not establish the insolvency of *Willis* and wife at the time of the sale to *Nicholson*, nor a fraudulent purchase of the slave by him from them; and in exonerating his succession from liability, the verdict and judgment are correct.

The agreement of *Mary Tabor* to hire the slave until the debt due by her to the plaintiff was paid, amounts to an antichresis, and to be binding on the property, should have been reduced to writing. Code, art. 3143.

The defendants, on this ground, objected to evidence of the contract. It was admitted by the court to prove a contract of hire, but the court and jury appear, by their verdict and judgment, to have disregarded it as proving a pledge of the slave and her hire until payment of her price; and we think with them, it should have had no binding effect upon the property.

The judgment of the district court is affirmed, with costs.

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\*This case was decided in 1851, in New Orleans, by consent.

T. R. WOLFE v. T. M. GILMER, and JAMES B. GILMER v. T. R. WOLFE.

L. R. GRIGSBY, Administrator, v. J. B. LEE et al., Intervenors.

When persons, married elsewhere, acquire property after they come to reside here, it belongs to the community of acquets; but not that which the husband purchases before he becomes a resident of Louisiana.

When the contract of partnership does not determine the share of each partner in the profits or losses, each one shall be entitled to an equal share of the profits, and must contribute equally to the losses.

**A**PPEAL from the District Court of the Parish of Caddo, *Bullard, J.\** *Gilbert and Landrum*, for plaintiff. *Spofford and Crain*, for defendant. *Lawson*, for intervenors. By the court:

PRESTON, J. This case is novel in its circumstances, and somewhat complicated, on account of the number of parties. The looseness of the transactions between the original parties, the fact that fictitious parties have appeared from the beginning of the business until now, that the litigation is approaching its termination, and that original parties, both nominal and real, are dead, may render it impossible to know exactly the rights of the litigants.

But as far as the facts are disclosed by the record, or perhaps ever can be, we think the district court has come to correct conclusions, and meted out substantial justice to all the parties. If, however, any injustice has been done to the appellant, of one thing we are certain, that it has resulted from the fact of his keeping his property in the names of other persons, we fear for illegal purposes; a practice the more to be reprobated, because it is so common.

In 1834, *Bushrod Jenkins*, then residing in Kentucky, purchased *Anderson's Island*, near Shreveport, and commenced its improvement as a cotton estate. For that purpose he purchased a number of negroes, particularly a lot of twenty-two, from *William Oldham*, for ten thousand dollars.

In 1836, he brought his family to Louisiana, and became a resident of the State. We may therefore dispose at once of a claim strenuously urged by the counsel of his widow, based upon the assumption, that the land and slaves thus acquired, belonged to the community of acquets which existed between her and her deceased husband. When persons, married elsewhere, acquire property after they come to reside here, it belongs to the community of acquets, but not that which the husband purchases before he becomes a resident of Louisiana.

There is nothing in the case of *Cole's Widow v. His Executor*, adverse to this principle. 7 M. R. 41. In that case the husband voluntarily separated from his wife, and established his residence in Louisiana. The true ground of the decision was, that his residence was her residence, and that he might have required her to come to reside in Louisiana, if he had chosen. In this case, the husband did not come to reside in Louisiana, much less his wife, until after his acquisition of the land and slaves erroneously claimed as belonging to the community, in opposition to the fair interpretation of the 2370th article of the Code.

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\* This case was decided in 1851.

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*Bushrod Jenkins* cultivated the plantation with some success for ten years, increased his property and credit, and became the owner of a joint interest in the town of Shreveport. It was believed by the neighborhood, that he was the sole owner of the plantation and slaves, and other property. The titles to the plantation and slaves, and Shreveport property, were all in his name alone; all transactions growing out of the ownership, were performed by him as owner. In those transactions he contracted numerous debts, and to a large amount, on the credit of the property, because none of his creditors knew that he was not the sole owner.

And yet a paper is produced on this trial, dated at Lexington, Kentucky, in 1835, signed by *Jenkins*, declaring that he owned the plantation and thirty slaves, in partnership with *Lewis K. Grigsby*. The day after its date, it was assigned to *Lewis Grigsby*, of that State, the father-in-law of *Jenkins*, and father of *Lewis K. Grigsby*.

We believe that *Grigsby*, the son, was a partner in the plantation and slaves, from its establishment, and never ceased to be, notwithstanding the assignment.

The instrument shows that he was a partner. He traded in slaves before 1834, and had means. *Jenkins* had but little means, and as has been stated, purchased 22 of the slaves from *William Oldham*, who was trading in partnership with *Grigsby*, in slaves. It seems probable that these slaves belonged to the partnership of *Oldham* and *Grigsby*, were put into the partnership with *Jenkins*, and settled for by *Grigsby* with his partner *Oldham*.

It is proved that *Grigsby* failed in 1834. He had a motive, therefore, for conducting the partnership in the name of *Jenkins* alone, and no doubt took the acknowledgment to which we have referred as a counterletter.

Notwithstanding the assessment, we do not believe his father ever had any interest in the property. It was a private writing, and there is no proof that it was ever delivered to the father. He never took possession of the property, or exercised any control over it. It is not shown that he ever paid anything for the assignment, and his heirs, he being dead, claim nothing under it, or ever heard of it. It is true, a suit to which we shall advert, was commenced in the United States Court in his name, for a settlement with *Jenkins*, but it was commenced, conducted and terminated, entirely by *Grigsby*, the son. It is true, that after *Jenkins'* death, a power of attorney was given by his father to one *Freman*, by which the latter sold the undivided half of the plantation and slaves to *Wolfe*. But *Grigsby*, the son, has had that sale declared fictitious by judgment.

For these reasons, and evidence in the record not adverted to, we do not believe that *Grigsby*, the father, or *Wolfe*, his vendee, ever had any interest in the property, and that though the one, and the curator of the other, are nominal parties to this litigation, that they have no interest in it. The real parties to the suit, and owners of the property, are *Lewis K. Grigsby*, and his sister, *Mrs. Jenkins*, and her minor children; and we shall not complicate the case by reference to any others.

*Jenkins* and *Grigsby* established the plantation with slaves, in the name of *Bushrod Jenkins*, commencing in 1834, and worked it in partnership until 1845. A suit was then instituted in the United States court by *Grigsby* against *Jenkins* for the partition of the property, and settlement of the partnership. But it was compromised, and the partnership extended indefinitely, by a notarial agreement, made on the 25th of November, 1845.

*Jenkins* was murdered in 1846, and the partnership first extended, dissolved by his death. *Thomas M. Gilmore* was appointed his administrator, and has

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administered his estate for several years. The property in Shreveport has been divided in kind between *Grigsby* and *Jenkins*' estate. The plantation and slaves have been sold, by consent of all parties. Half the proceeds have been delivered to *Gilmore* for administration; the other half remains in the hands of the sheriff, subject to distribution in this suit. The widow of *Jenkins* claims half of the whole, individually. We have disposed of that claim. She claims half the estate, as tutrix of her minor children, and *Grigsby* claims the other half. The creditors claim to be paid out of the whole estate, and in this *Mrs. Jenkins* supports them. But *Grigsby* insists, that they are to be paid out of the part of *Jenkins* alone. The just settlement of the rights of all the parties, grows principally out of the proper construction of the agreement and compromise between *Jenkins* and *Grigsby*, dated the 25th of November, 1845.

It establishes: 1. That *Jenkins* and *Grigsby* had owned in joint partnership a plantation and slaves, in the parish of Caddo. 2. That a suit had been instituted by *Grigsby*, for a partition of the partnership property, and whatever balance might be found due to him. 3. *Jenkins* acknowledges that *Grigsby* is the owner of an undivided half of the plantation and slaves which are described, and conveys him a title. 4. It is disclosed, and *Jenkins* acknowledges, that *Grigsby* is the owner of one undivided half of his interest in the town of Shreveport. 5. It is provided that the plantation and slaves shall be kept together, and worked in partnership, for the mutual expenses of the joint owners, the expenses of the plantation to be paid out of the proceeds of the crops. 6. *Jenkins* is authorized to sell the lots in Shreveport, provided the proceeds shall be applied to the payment of the debts, which are particularly enumerated in the agreement. 7. They are declared to be the debts of *Jenkins*, but are to be paid out of the partnership property, or the revenues arising from the same. 8. The debts are then enumerated, and it is again stated, that they are debts previously owing by *Jenkins*, but to be paid out of the revenues and proceeds of the property.

This agreement indicates, that the name of *Jenkins*, as connected with the debts, is used, as it had been from the establishment of the plantation, to represent the partnership. 2. That the enumerated debts were partnership debts. And 3, to be paid out of the revenues, and in default thereof, the proceeds of the sales of the partnership property. And, as it is impossible to believe that *Grigsby* would consent that his revenues should be used, or his property sold to pay debts he did not owe, we are forced to conclude, that they were debts due by him as a partner. And then the exemption contained in these words: "without making *Lewis Grigsby* personally bound for the same in any manner whatsoever," applies appropriately, as it does literally, to *Lewis Grigsby*, the father, in Kentucky, whose name the parties were using fictitiously in a partnership, in which he had no interest whatsoever.

This then is a partnership, to be settled, like any other, between *Grigsby* and his sister, representing her minor children.

The agreement, of which we have extracted the substance, shows sufficiently that they were equal partners in the plantation, slaves and property in Shreveport. No stock account or books being furnished, and neither party pretending to have made, or that the other received advances, their equality of interest in the partnership, and in its losses and profits, is easily presumed. Code, art. 2836. The agreement fixes likewise, with reasonable certainty, the partnership debts to be paid out of the partnership property; and the creditors having become

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parties to the liquidation, they must be paid before the surplus is definitely divided.

There are some discrepancies between the amounts of the debts, as stated in the agreement, and the amounts established by the creditors. The statements in the agreement were merely descriptive of what debts were to be paid, and not intended or reasonably expected to be precisely accurate. The discrepancy is so great as to the claims of *Kohn, Daron & Co.* and *J. J. Jackson*, that we would be disposed to yield relief, but for the conviction, as repeated so often, that they were debts of a partnership carried on in the name of *Bushrod Jenkins*, of which *Lewis K. Grigsby* was the secret partner. There is no reason to believe that *Jenkins* intended to deceive, in stating the debts of the partnership of which he had been the manager. Thus the discrepancy in the case of *Kohn, Daron & Co.*, which is much the largest, grew out of the accumulation of interest, that moth of estates, as may be seen at page 682 of 5 Ann. The judgment against him, mentioned in the agreement, did not bear interest, and he probably thought himself exonerated from interest.

There is still less reason for objecting to the debt of *Burne* and *Burnside*, because evidenced by a bill of exchange, while it is stated in the agreement to be a note, or the debt of *Dick* and *Hill*, because proved by a note, whilst the agreement describes it by a bill of exchange. Neither of the parties were subjecting themselves by the agreement to the debts of the other, but both were fixing what were partnership debts, to be paid out of the partnership property, and without which *Jenkins* would not have made titles to *Grigsby*, entered into the compromise, or continued the partnership, but have compelled the partner to establish rights with the same exactitude which the latter now requires.

The same observations apply to the claim of *Stinson*. And under the circumstances, the debt of *Lee* is sufficiently proved. It was acknowledged in the agreement as a small balance of account, but sued for by virtue of a note for two hundred dollars, bearing ten per cent interest. The attorney who brought the suit was well acquainted with *Jenkins*; says that it was a note on *Bushrod Jenkins*, and that it had been lost or mislaid. The advertisement of its loss was admitted. No question was made as to the signature, or we have reason to believe, it would have been more expressly proved by *Mr. Lawson*, the attorney, so well acquainted with *Jenkins*.

As the record showed that *Gilmer*, the administrator, had eight thousand dollars in his hands, proceeding from the revenues of the property, there is no reasonable objection to the decree of the court, directing its appropriation to the debts specified in the agreement, though neither party appears to have specially demanded it. If he has now, or should hereafter have, other funds of the partnership, a like distribution may be made, with which the present does not interfere. The costs of a large record like the present, should not be thrown on the appellees, for unsubstantial reasons. •

The judgment of the district court is affirmed, with costs.



STERLING BALDREE v. F. J. DAVENPORT. A. M. COLEMAN,  
Intervenor.

When an intervenor stands in the position of a plaintiff, in a petitory action, he will be bound to establish, by satisfactory evidence, a title to the property which he claims.

**A** PPEAL from the District Court of the Parish of Morehouse, *Copley, J. McGuire and Ray*, for plaintiff. *Richardson and Newton*, for defendant.

*Parsons and Sharp*, for intervenor. It was an estate commencing in *presenti*, intended to be occupied in *futuro*, and upon the delivery of the deed, the whole estate passed at once from the grantor to the grantee, 2 Blackstone, 166, 167. 5 Humphrey's (Tenn.) Reports, 411. 7 R. R. 481. 12 R. R. 660.

In the ante-nuptial contract between *Ruth Baldree* and her husband, the power to make such disposition of her property, was expressly reserved, and the deed of gift being made in accordance therewith, is good. 2 Story's Eq. sec. 1388, 1390, and authorities there cited. 2 Roper on Husband and Wife, ch. 16, sec. 2, p. 102. *Youngblood v. Flagg*, 11 L. R. 341.

The court below erred, in admitting, on the trial, the deed purporting to be from *Ruth Baldree* to *Elizabeth Ruth Kelly*, for the slaves in controversy, which had been previously donated to *Eliza Waters* and her children, for the reasons set forth in intervenor's bills of exception. The signature of *Moses Waring*, one of the subscribing witnesses to the deed, was not sufficiently proven, nor that of the other witness; and, even had one, or both these signatures been established, without proving the signature of the donor, the deed was inadmissible. *Dismukes et al. v. Musgrove*, 7 N. S. 63. 7 M. R. 209. 9 L. R. 521. 2 Ann. 217. 11 L. R. 251. 3 R. R. 206. C. C. 2241.

As to its effect, the deed having been made in the State of Alabama, if such a deed was made at all, which is denied, was void, for the want of record, and could confer no title. *Clay's Digest*, p. 255. 2 sec. Statute of Frauds, 2 Ala. Reports, 684, 648. Moreover, it was made by a married woman, without the consent and authorization of her husband, and is, therefore, void. C. C. art. 1467. The only power reserved to her in her marriage settlement, to dispose of her separate estate, had been previously exercised and exhausted when she executed the deed to *Eliza Waters* and her children. The life estate reserved to her therein, was, at furthest, all that she could dispose of.

The deed of gift to *Eliza Waters*, and her issue, divested *Ruth Baldree* of the fee of the property conveyed; and, of course, the power to make a subsequent disposition, even if the former had not been declared irrevocable. The deed to *Elizabeth R. Kelly*, is, therefore, an absolute nullity, and even if it had been properly proven, could confer no greater right than the grantor had, at the time of making it, which was but a life estate, the ownership of the slaves having already been vested in the first-named grantees, *Eliza Waters* and her children. *Jarman on Wills*, 11, 13, ne. 1 Ala. Reports, 52. 13 Ala. Reports, 731. *Summerlin, Adm'r., v. Gibson et als.* 15 Ala. Reports, 411. 1 Domat lib. 27, tit. 2, sec. 1. C. C. art. 1454, 9. *Porter's Ala. Reports*, 649. *Graham v. Lambert*, 5 Humphrey, 595.

There can be no doubt but that the girl, *Mary*, was purchased with funds arising from the sale of *Austin*, who was one of the slaves mentioned in the deed of gift, to *Eliza Waters* and children; in fact, the decree of the chancery court at Hayneville, clearly recognizes this fact; and, if so, she forms as much a part of the trust estate, created by this deed, as any of the negroes named in it. *Law Library* 39, p. 131. 4 Kent, 306, and notes. 1 Johnson's ch. R. 450. 3 Howard's Supt. C. R. 405.

The deed of gift to *Eliza Waters* and her children, made in pursuance of the marriage settlement, and in accordance with the power reserved therein, perfected the settlement of the property previously made on *Eliza Waters* and her issue, after the death of the donor, and is valid. 2 Kent, 164, 170, 174. 2

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Leigh 183. This power to dispose of her separate estate, was expressly reserved by *Ruth Baldree*, in the instrument creating it, and the disposition made, was in accordance therewith. The deed is therefore good. 1 John's ch. R. 450. 2 Wharton, 11. 10 Serg. and Rawle, 447. The law respecting marriage settlements in South Carolina, is understood to be essentially the same as in Pennsylvania, Virginia, North Carolina, and Kentucky. 4 Dallas, 304, 307.

The deed created a particular estate for life in *Ruth Baldree*, and a vested remainder in *Eliza Waters* and her issue, who held the fee, and to whom a legal and equitable seizin was given. 4 Kent, 201. 2 Blackstone, 164. *Williams v. Caston*, Strobhart's South Carolina Reports, 130. 7 Iredell, N. C. Reports, 123.

It was not a contingent interest; depended on no uncertain event, and *Eliza Waters* and her issue had a right to the immediate possession and enjoyment of the property conveyed, upon the death of *Ruth Baldree*, when the precedent estate ceased. 2 Blackstone, 168. 1 Strobhart South Carolina Reports, 442. 1 Branch, 64. 5 Alabama Reports, 5, 7, 8; and 1 Richardson's South Carolina, 161, 170. 11 John's cas. 91. 6 Peters, 68. 5 Mass. 535

This interest, then, being vested and determined, when the particular estate was created, the grantor, *Ruth Baldree*, holding a life estate, was without the power to make any subsequent disposition of the property, to *Elizabeth Ruth Kelly*, or any one else. 2 Blackstone, 166. 15 Ala. Rep. 406. 2 Ala. Rep. 648. 4 Ib. 158.

Such a deed is similar in its nature to a donation *inter vivos*, and when once perfected by delivery, the fee of the property conveyed vested absolutely in *Eliza Waters* and her issue, and the grantor could not then revoke it, even if it was not, by its terms, irrevocable. 1 Strobhart's South Carolina Reports, 48. *McCutchen v. McCutchen*, 9 Porter's Alabama Reports, 649. 2 Root, 383. 4 Watts and Serg. 221.

It may be urged that the property conveyed was never actually delivered to the grantee. This was not necessary, and could not be done during the life of *Ruth Baldree*, who had reserved to herself a life estate in it. A delivery of the deed was sufficient. 12 Alabama Reports, 29. 9 Alabama Reports, 144. 4 Alabama Reports, 158. 5 New Hampshire Reports, 71. 2 Root, 26. 15 Wend, 656.

It may be said that if intervenor's title to the slave, *Will*, is good, he being mentioned in the deed of gift, that he has shown no right to *Mary* and her children, who comprise the balance of the negroes in controversy. It is true that none of these last are named in the deed, but it is alleged that *Mary* was purchased with funds belonging to the trust estate, to wit, the proceeds of the sale of *Austin*, who was named in the deed; and, although *Allen W. Coleman*, who purchased *Mary* for *Mrs. Baldree*, took the deed in his own name, it was expressly stipulated that *Ruth Baldree* was to have a life estate in her, and that the girl was for her use.

It is a doctrine well established, both by reason and by the decisions of the courts of other States, that when property conveyed by a deed of trust, (as this was,) is sold, the proceeds of that property should be applied as provided in the deed. 9 Porter's Alabama Reports, 547.

In the purchase of *Mary*, *A. W. Coleman* acted merely as trustee, and property bought with trust funds, belongs to the *cestui que trust*, who was *Eliza Waters* and her children. 10 Alabama Reports, 400, 460, 151. 4 Porter's Alabama Reports, 27.

Having, as we think, shown that *Francis P. Coleman* is clearly entitled to the property, intervenor prays that the judgment of the district court be reversed, and that he be decreed to be the owner, and that he have judgment also for the hire of the same as prayed for in his original petition, with costs in both courts.

By the court:

SLIDELL, J. The intervenor stands in the position of plaintiff, in a petitory action, and is bound to establish, by satisfactory evidence, a title in his ward, for whom he claims.

As regards *Davenport*, who stands before us as a purchaser in good faith, we have no hesitation in saying, that the judgment ought not to be disturbed. For

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there is no sufficient evidence as to the slaves in his possession, that their alleged mother, *Mary*, was purchased with funds arising from the sale of *Austin*, one of the slaves mentioned in the deed of gift to *Eliza Waters*. The decree in chancery, upon which the intervenor relies, to show that essential fact, does not distinctly so adjudge, and was interlocutory in its nature. Moreover, the testimony is quite loose as to the maternity of the slaves; and, indeed, the record is so complicated, that it is not clear what evidence was offered against *Davenport*.

As to the defendant, *Harriet Herbert*, we have found greater difficulty in coming to a conclusion. But, after considering the facts of the case, which are extremely complicated, and endeavoring to apply to them a jurisprudence with which we are not familiar, and upon which we must necessarily pronounce with great diffidence, we are unable to say that the intervenor has shown such title in his ward, as would justify us in changing the judgment rendered below, in any respect, except as to the slave named *Will*.

It is not improper to add, that the subject matter of this controversy was hitherto before a court of chancery, in Alabama, where the rights of the intervenor and *Harriet Herbert*, could have been considered by minds versed in the intricate doctrine of trusts, and marriage settlements, and safely adjudicated. But the intervenor abandoned that forum.

The slave *Will*, it seems, was mentioned in the marriage settlement, and as the minor appears to be one of the heirs of *Mrs. Baldree*, we have considered it equitable, under all the circumstances, to amend the judgment so as to leave his claim, as heir for the slave, open.

It is therefore decreed, that the judgments from which the intervenor has appealed, be affirmed, reserving only to said *Francis P. Coleman*, minor, the right to enforce, by any future action, whatever rights he may have as to the slave *Will*, as heir of *Ruth Baldree*, the cost of the appeal to be paid by *Harriet Herbert*.

STERLING BALDREE v. F. J. DAVENPORT. A. M. COLEMAN  
Intervenor.

A decree of the chancery court in Alabama, and a deed of compromise executed there, that would have the effect in that State of estopping a party from setting up title to certain property, will receive a like construction in the courts of Louisiana.

A party who gives no appeal bond, cannot be heard as an appellant, without the consent of the appellee.

APPEAL from the District Court of the Parish of Morehouse, *Copley, J.\** *McQuire* and *Ray*, for plaintiff. *Newton*, for defendant. *Parsons* and *Sharp*, for intervenor. By the court:

SLIDELL, J. We consider the judgment against *Baldree* as fully sustained by the evidence. He is estopped from setting up any title adverse to the defendants, by the decree of the chancery court in Alabama, and by the deed executed by him on the 18th of September, 1846, soon after he brought the slave to this State, in contempt of that decree. The decree of compromise is

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\*This case was decided in New Orleans.

BALDREE  
v.  
DAVENPORT.

inartificially drawn, but manifests a clear intention on his part to abandon all pretensions whatever to the slave. We do not doubt but that in Alabama, the decree of whose court he had grossly violated, and from whose jurisdiction he had unlawfully withdraws the property, that deed, (aided, as it is, by the testimony of the subscribing witness, which has been received without objection) would be considered as a binding and conclusive compromise and quit claim, insuring to the benefit of *Mrs. Baldree*, and excluding him from any future pretensions against her, her trustee, heirs or assigns, or persons claiming under the trustee, *Harriet Herbert*. We see no reason why, under the circumstances of this case, a like effect should not be given to the deed in the courts of Louisiana against *Baldree*. See *Frierson v. Erwin*, 5 Ann. 530.

There was also judgment against the intervenor, *Coleman*, and he moved for an appeal. But he never gave any appeal bond, and cannot be heard as an appellant without the consent of the defendants. *Davis v. Anty*, 3 N. S. 142.

It is therefore decreed, that the judgment against *Baldree* be affirmed, and that he pay the costs of the appeal. It is further decreed that, as to the said *Coleman*, the appeal be missed.

### OLIVER, Curator, v. BRY AND STEPHENS.

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In civil matters one must be sued before the judge having jurisdiction over the place where he has his domicile. But in matters relative to warranty, the warrantor may be brought before the court having cognizance of the principal action in which the demand in warranty arises.

One may be called in warranty in a personal action. C. P. 378, 379.

**A** PPEAL from the District Court of the Parish of Ouachita, *Sharpe, J.*  
By the court:

*PRESTON, J.* This suit is instituted by the curator of the succession of *Wm. T. Day*, on a note due the 28th day of September, 1840, with ten per cent interest from maturity until paid.

*Day* and one *Beasly* purchased from *McEnery* a hotel in the town of Monroe. They gave him their two notes for \$3333 33 $\frac{1}{4}$  each. The notes became the property of *L. Millaudon* of New Orleans.

*Day* having died, and a curator having been appointed to his succession, *Millaudon* applied, under articles 990, 991 and 992 of the Code of Practice, for the sale of *Day's* undivided half of the premises to meet the payment of the two notes. The property failed to produce the appraisement, when it was sold at twelve month's credit, and the defendants became the purchasers for the note on which this suit is instituted.

*Millaudon* afterwards instituted suit on the original notes of *Day* and *Beasly*, against the latter, and sold his undivided half of the property, but not for enough to pay his half of the debt.

The defendants allege in defence, that the probate sale at which they purchased was made to pay the two notes of *Day* and *Beasly*, in the hands of *Millaudon*, with vendors privilege and mortgage on the property they pur-

\*This case was decided in 1851.

OLIVER  
v.  
BRY.

chased. This was admitted, and that the price they bid was to go to *Millaudon*. They alleged further, that they had purchased from *Millaudon* his rights to the price bid by them, and to the two notes it was destined to pay. They prayed that *Millaudon* might be made a party to the suit, and that they might be permitted to show these facts in defence.

He excepted, and it was admitted that he was a resident of New Orleans, and that he could not be sued on the supposed contract in the parish of Ouachita. The exception was sustained on the general ground, that in civil matters one must be sued before the judge having jurisdiction over the place where he has his domicile.

That is true; but in matters relative to warranty, the warrantor may be brought before the court having cognizance of the principal action in which the demand in warranty arises. Code of Practice, art. 165, No. 4.

Now, if *Millaudon* sold the notes of *Day* and *Beasley* to the defendants, and also the fund which was to be applied to their payment, as alleged, and to be taken for granted for the purpose of the exception, he contracted an obligation to warrant the defendants against a suit for that fund, for his benefit. And though the action is personal, might be called in warranty. Code of Practice, arts. 378, 379.

But the great difficulty is in extending these principles to suits which are incidental to the settlement of successions, as they might complicate and protract the settlement forever. We will overrule the exception, and allow a stay of execution until *Millaudon* establishes his right to the fund contradictorily with the defendants and other creditors of the succession, on the final tableau of distribution.

It is palpable, however, by the record, that *Millaudon* received from the defendants \$1666 66 in April and June, 1841. If received in purchase of *Day* and *Beasley's* notes, their defence is valid; if received in part payment of their own note, equity requires that it should be credited upon it, the note being substantially his property. In either hypothesis, the defendants must enjoy the benefit of those payments.

The defendants contend, that their note should not bear ten per cent interest from maturity, because that condition is not prescribed in the *proces verbal* of the sale of the property, which they purchased at twelve month's credit. The order of the court of probates, for the sale of the property, prescribed that condition; the property was sold to pay a debt bearing ten per cent interest, and they gave their note for the price, with ten per cent interest until paid, if not paid at maturity. The legal effect of the whole proceeding was to require the payment of that interest, and we have no reason to believe that they were in error, in point of fact, in expressly making their note to bear that conventional interest.

The judgment of the district court is reversed; and it is decreed, that the plaintiff recover, with costs, from the defendants three thousand three hundred and fifty dollars, with ten per cent interest from the 28th of September, 1840, until paid, but that the same be credited with \$833 33½ on the 29th of April, 1841, and the like sum of \$833 33½ on the 8th of June, 1841. Further, that the plaintiff have the privilege of vendor and right of a mortgage creditor on the property sold to the defendants, and described in the *proces verbal* of the sale of the estate of *William T. Day*, on the 28th of September, 1839, and for which the note sued upon was given, and that the said property be sold to satisfy this judgment. But it is further ordered, that execution be delayed

OLIVER  
v.  
BRY.

until *L. Millaudon* establishes contradictorily with the defendants and the creditors of the estate of *William T. Day*, on the final tableau of distribution, his right to the benefit of this judgment. The costs of this appeal to be borne by the appellees.

THOMAS D. WADDIL, Tutor, v. ELIZABETH THOMPSON. WILLIAM SHAW, Intervenor.

This suit was brought by a father as tutor of his minor child, who was the real plaintiff. Pending the appeal, the child died. The father suggested the death, and asked to be made a party to the suit in his own right. *Held*: That there was evidence in the record that the father was the only heir at law, and therefore entitled to prosecute the appeal in his own right.

APPEAL from the District Court of the Parish of Caddo, —, J.\*  
By the court:

ROST, J. This is a possessory action, in which the plaintiff, as tutor of his infant daughter, claimed from the defendant a slave, which he alleged had been in the possession of his late wife, as owner, during more than one year at the time of her death.

The defendant disclaimed any right to the slave, but *William Shaw*, the grandfather of the minor, intervened, alleging the possession to be in him, and that of his grand-daughter to have been precarious, and insufficient to support the present action.

The case was tried before a jury, who found for the plaintiff, in the capacity in which he sued. And *William Shaw* has appealed from the judgment rendered on the verdict.

During the pendency of the appeal, the child, who was the real plaintiff in the suit, died, and her father, the nominal plaintiff, suggested her death in court and applied for leave to become a party to the suit in his own right, and to prosecute the same to final judgment, on the ground that he is the sole heir of his deceased child, and entitled, as such, to her entire succession. A brief on the merits has been filed on his behalf.

The appellant admitted the death of the minor, but he has not appeared to give his consent to this change of parties; and if the record did not contain satisfactory evidence of the truth of the facts upon which the application is made, we would feel it our duty to remand the cause to try the issue of her ship. But it is in evidence, that *Virginia Shaw*, the wife of the plaintiff, was a young maiden, living in the house of her guardian, the intervenor, at the time of her marriage, in July, 1849, and that she died in October, 1850, leaving an only child, since deceased. Under that state of facts, there could be no testamentary heir, and the father was necessarily the only heir at law. He is, therefore, entitled to prosecute the appeal in his own right.

On the merits, the case turns upon questions of fact, and the verdict and judgment are fully sustained by the evidence. The mode in which the intervenor, *Shaw*, obtained possession of the slave after the death of his grand-daughter, would, alone, justify them. He made oath before a justice of the peace, that

\*This case was decided in New Orleans by consent.

WADDIL  
v.  
THOMPSON.

he believed that his grand-daughter had come to her death by the act of the slave in controversy, and caused a warrant to issue for her. His own overseer having been appointed special constable, executed the warrant and took her for safe keeping to the intervenor's plantation, who then discontinued the prosecution, stating that he was sorry for what had been done, but refused to return the slave to the plaintiff.

It is therefore ordered, adjudged and decreed, that *Thomas D. Waddil* be recognized as the legal representative of the plaintiff, and that he be made a party to the appeal in his own right. It is further ordered and decreed, that the judgment of the court below be affirmed, with costs.

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GEORGE W. COPLEY v. HASSON AND LAZANE.

In this case the plaintiff claimed, under a sheriff's adjudication of the property, by virtue of an order of seizure and sale *via executiva*; the defendants, under a tax collector's sale for taxes. *Held*; That the tax sale was null, because the property was not sold for the amount of the special mortgages existing upon it.

That the hypothecary action was not necessary, because the defendants were not, at the time of the seizure, in the actual or even civil possession of the property, under the tax sale.

That as between mortgagor and mortgagee, the property was clearly mortgaged by the *proces verbal* of sale.

APPEAL from the District Court of the Parish of Jackson, ———, J.*
By the court:

ROST, J. When this case was before the court, at the last term of this court at Monroe, we examined with great minuteness the respective pretensions of the parties to the property in controversy. We left open but three subjects for further examination by the district court, and for which the case was remanded.

The plaintiff claimed under a sheriff's adjudication of the property, by virtue of an order of seizure and sale *via executiva*; the defendants, under a tax collector's sale for taxes.

The order of seizure and sale was granted before the tax sale, but was not executed until afterwards. We left the question open to ascertain whether the plaintiff should not have proceeded against the defendants, as third possessors, by the hypothecary action, properly so called, and not against the mortgagor alone.

The defendants having purchased at a tax sale, did not appear to have afterwards advertised, as required by the existing laws, in order to enable the owners to redeem, or the purchasers to perfect their title in default of redemption.

As the property had been sold, not for taxes upon it, but for a tax upon a tavern, and therefore there was no privilege upon the property, we doubted the validity of the sale, inasmuch as it did not sell for the amount of the special mortgages upon it.

No new light or evidence has been thrown upon these questions, except that the defendants had not actual possession, under the tax sale, when the order of

*This case was decided in New Orleans by consent.

COPELEY
v.
HARRON.

seizure and sale was executed; nor hardly a civil possession, inasmuch as the tax sale had not been completed by the publications necessary to enable the owner to redeem.

We are of opinion that the tax sale was null, because the property was not sold for the amount of the special mortgages existing upon the property. And further, that the order of seizure and sale, under which the plaintiff's claim was properly executed against the original mortgagors, and that the hypothecary action against the possessors was not necessary, because the defendants were not, at the time, in the actual or even civil possession of the property under the tax sale.

The argument of defendants against the order of seizure and sale, upon the supposition that the mortgage was not recorded in the mortgage office fails, because it appears at page 56 of this long record, that it was duly recorded in the mortgage office.

As between the mortgagor and mortgagee, the property was clearly mortgaged by the *proces verbal* of sale, and that was exhibited to the district judge, as he orders the mortgage property as specified in the *proces verbal*, to be seized and sold, as claimed in the petition, that is, for the payment of its price.

The district court appears to have made out a very just and equitable estimation of the improvements, as well as of the rents and profits of the property seized, for according to the evidence, if a writ of possession should be issued before the balance found in favor of the defendants shall be paid, it might be enjoined.

It is therefore ordered, adjudged and decreed, that the judgment of the court below be affirmed, with costs.

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W. W. GEORGE, Curator, v. J. R. ROACH, and J. R. ROACH &  
W. W. GEORGE, Curator.

The equitable doctrine established in the case of *Pepper v. Dunlap*, 5 Ann. 200, that when a purchaser, who has received possession from his vendor, buys, afterwards, an outstanding and superior title, and thus perfects and quiets the defective title, and the possession which he received from his vendor, the second purchase will inure to his vendor's benefit, does not apply to a case in which the vendor never had, and gave no possession, and was aware of an outstanding title, and knew that he was selling what belonged to another.

**A** PPEAL from the District Court of the Parish of Caddo, ———, J.\*  
By the court:

Rost, J. A lot of ground in the town of Shreveport was sold to *Roach*, at a probate sale, by *George*, Curator, and the vendee gave his notes for the price. Being sued upon them, he restricted the action, upon the ground that the succession of *Sprague* was without title, and claimed a rescision of the sale. There was a judgment for the defendant in the court below, and the plaintiff has appealed.

It is proved that, at the date of the probate sale, the title was in a third person, from whom *Roach* subsequently purchased the same piece of ground. This third person, and those under whom he held, had been in possession for many

\*This case was decided in New Orleans by consent.



GEORGE  
v.  
ROACH.

years. The succession of *Sprague* never had possession, nor had *Roach*, until he received it from his third person. It is clear, therefore, that there was a failure of the consideration of the note given by *Roach*.

But it is said that *Roach*, having purchased the title, is only entitled to be relieved from the payment of his notes up to the amount which he expended to acquire it.

In the case of *Pepper v. Dunlap*, we recognized the highly equitable doctrine, that when a purchaser, who has received possession from his vendor, buys afterwards an outstanding and superior title, and thus perfects and quiets the defective title and the possession which he received from his vendor, the second purchase will inure to his vendor's benefit, so that his liability as warrantor will be restricted to the amount so expended.

But the equity cannot be invoked in the present case; for the succession never had, and gave no possession, and it is shown by the curator's official acts, that he was aware of his outstanding title, and knew that he was selling what belonged to another.

It is therefore ordered, adjudged and decreed, that the judgment of the court below be affirmed, with costs.

### COPLEY AND NEWMAN v. DINKGRAVE, Sheriff et al.

The bond of a sheriff and State tax collector is not a bond for a sum of money, but a bond for the performance of official duties, and if the duties are not performed, each of the sureties is bound to the full amount for which they have obligated themselves.

The 6th section of the Act of 1847, providing that in no case securities shall be liable for each other, or beyond the amount for which each one may have obligated himself in the bond, is very far from saying that they shall not, in every case, be bound for that amount. If the obligation of each surety is to be ascertained without regard to that of the others, they stand, so far as the State is concerned, as if only one of them had signed the bond, and in that case the party signing would be liable to the full amount of his obligation.

When there is no separate book kept by the recorder of mortgages to record sheriff's bonds, the recording the bond in the book of mortgages will be sufficient notice, under the Act of 1847.

The 46th section of the Act to provide a revenue for the support of the government of the State, provides, that the bond of the collector of taxes shall operate as a legal mortgage on the lands and slaves of the collector. This act attaches the mortgage to the bond itself, and as it is silent as to the manner of recording that mortgage, the usual mode of inscription, in the book of mortgages, will be sufficient.

The sureties upon the bond of a collector of taxes, cannot avail themselves of any fraud committed by him.

There is nothing in the Act of 1847 suspending the operation of the penalty which it imposes on collectors of State taxes, who fail to account.

The 63d section of the Act to provide a revenue for the support of the government of the State, ordains, that if any tax collector shall neglect or fail to pay into the treasury the amount due by him, and to obtain the treasurer's receipt therefor, he shall forfeit the commission allowed to him by law.

**A** PPEAL from the District Court of the Parish of Ouachita, *Barry, J. Copley and Garrett, and Ludeling*, for plaintiffs. *Matheus*, for defendants.  
By the court:

ROSE, J. The plaintiffs were two of the securities of *W. H. Coats*, a former sheriff of the parish of Ouachita, on his bond as sheriff and State tax

COPLEY  
DINWIDDIE

collector for the year 1846. The bond was given on the 16th of September, 1847. He failed to pay over, into the treasury, the entire amount of taxes for that year, and the auditor issued an execution against him and his securities for the balance unpaid. The plaintiffs have enjoined the sale of some of their property, seized by the sheriff, under that execution. The district attorney appeared in behalf of the State, and after hearing, the injunction was dissolved. The plaintiffs have appealed.

We are unable to discover any error in the judgment. This was not a bond for a sum of money, as erroneously assumed in argument by counsel; it was a bond for the performance of official duties, and if the duties were not performed each of the sureties was bound to the full amount for which they had obligated themselves. The sheriff himself gave bond for the sum of \$5119 16. Each of the sureties bound himself for the sum of \$1716 38. The sheriff paid \$2042 50 into the treasury, leaving a balance of \$1370 94 unaccounted for on the taxes of 1846. Each of the sureties is bound, upon the bond, for that balance. The 6th section of the Act of 1847 providing, that in no case securities shall be liable for each other, or beyond the amount for which each one may have obligated himself in the bond, is very far from saying that they shall not in every case be bound for that amount. If, as alleged, the obligation of each surety is to be ascertained without regard to that of the others, they stand, so far as the State is concerned, as if only one of them had signed the bond; and in that case it would not be seriously contended, that the party signing would not be liable to the full amount of his obligation. The authorities cited from Pothier and Duranton relate to obligations for the payment of money, in which each surety binds himself to pay a fractional share of the principal obligation, and are inapplicable to official bonds, in which securities have bound themselves for specific sums.

2d. As there was no separate book kept by the recorder to record sheriff bonds, we are of opinion that the recording of the bond in the book of mortgages would have been sufficient notice under the Act of 1847; but by the 46th section of the Act to provide a revenue for the support of the government of the State, which was subsequently passed, it is provided, that the bond of the collector of taxes shall operate as a legal mortgage on the lands and slaves of the collector. The provision of the former act was, that the recording of the bond in a separate book kept for that purpose, by the recorder, would give it the effect of a mortgage. The subsequent act attaches the mortgage to the bond itself, and as it is silent as to the manner of recording that mortgage, we hold the usual mode of inscription, in the book of mortgages, to be sufficient.

3d. It is in evidence that some movable property of *Coats*, valued at \$1200 had been first seized; that he gave a forthcoming bond to deliver the property on the day of sale, which the sheriff accepted, on the advice of the district attorney. *Coats* failed to deliver the goods, and the bond was declared forfeited, but the auditor of public accounts refused to have anything to do with it, and ordered the sheriff to proceed on the execution in his hands. The plaintiffs contend that they are entitled to a credit for the value of the goods seized, which the bond represents.

That bond, whether regularly taken or not, was not a satisfaction of the debt. The collector, *Coats*, in failing to deliver the goods, committed fraud upon the State, and his securities can no more avail themselves of that fraud than he himself could. Their only remedy is to pay, and make the amount out of the forfeited bond, if they can.

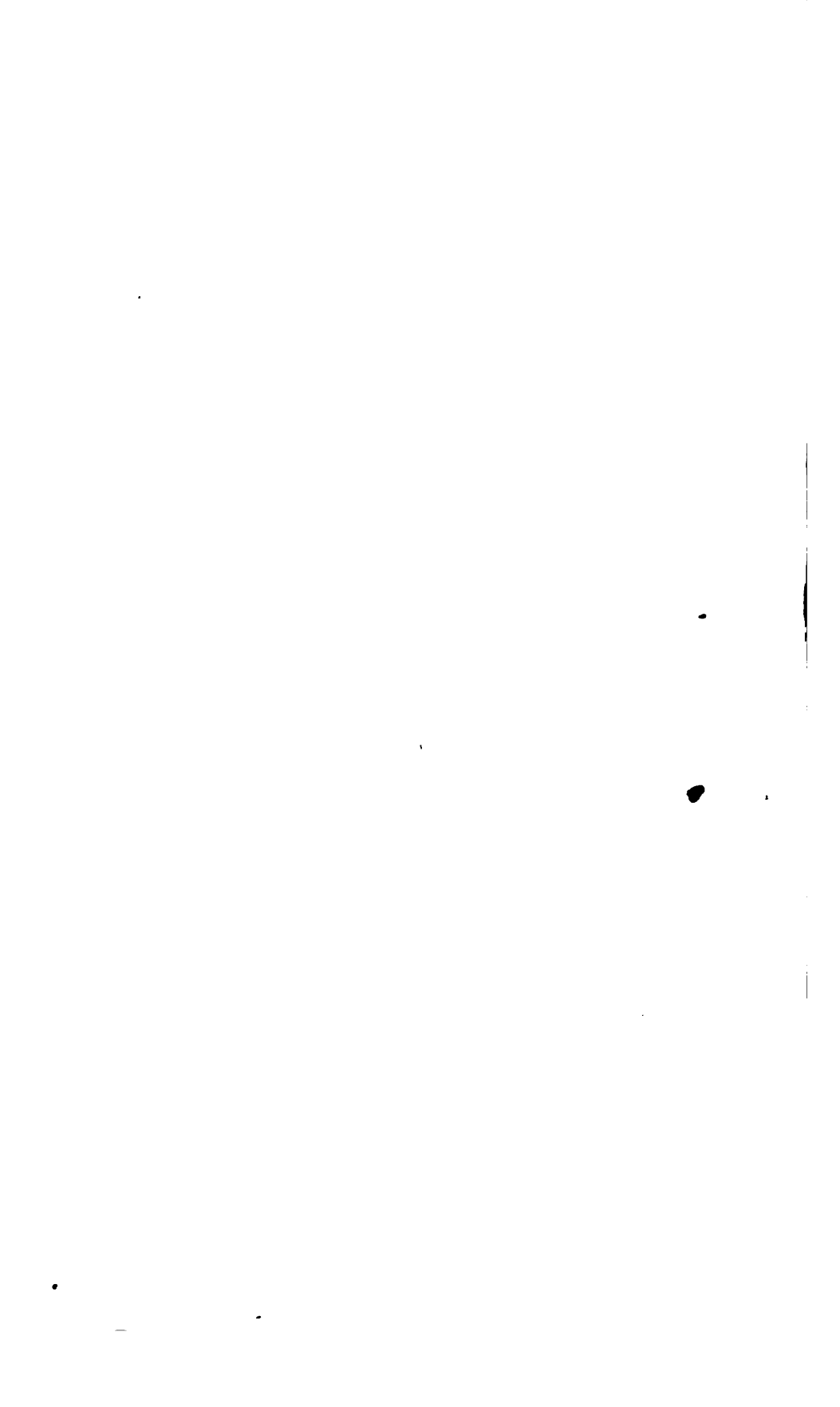
4th. There is nothing in the Act of 1847, suspending the operation of the penalty which it imposes on collectors of State taxes who fail to account. That penalty is therefore due in this case. The delays, fixed by law, for the return of ordinary executions, do not affect cases of this kind.

5th. The 63d section of the Act to provide a revenue, &c., ordains, that if any tax collector shall neglect or fail to pay into the treasury the amount due by him, and to obtain the treasurer's receipt therefor, he shall forfeit the commission allowed to him by law. The commission on the sum collected in this case, has clearly been forfeited under this disposition of law, and the plaintiffs are not entitled to be credited with it.

The judgment is affirmed, with costs.

NOTE—It is proper to state that the records from Monroe had been opened before they were received by me. Some of the records contained no judgments, and some of the judgments were unaccompanied by the records. This will account for my not naming either the court or counsel in some of the cases.

B.



# CASES

ARGUED AND DETERMINED

IN THE

## SUPREME COURT OF LOUISIANA,

AT

## NEW ORLEANS,

IN

### NOVEMBER AND DECEMBER, 1852.

JUDGES PRESENT.

HON. GEORGE EUSTIS, *Chief Justice.*

HON. PIERRE ADOLPHE ROST,  
 HON. THOMAS SLIDELL,  
 HON. WILLIAM DUNBAR, } *Associate Justices.*

JOHN BACON et al. Trustees, &c., v. DAHLGREEN AND WIFE et al.

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A judgment, pending an appeal, will not sustain a plea of *res judicata*.

The following was the form of the note on which defendants were sued: "Natchez, January 27, 1839. On the first of March after date, we, or either of us, promise to pay the president, directors and company of the Planters' Bank of the State of Mississippi, for value received, \$63,945, payable and negotiable at the Planters' Bank of the State of Mississippi, at Natchez. MARY M. ELLIS, administratrix of T. G. Ellis, deceased; JOHN ROUTH, ELIAS OGDEN." *Held:* Under our laws, an instrument of this kind would be prescribed by the lapse of ten years from its maturity; and this prescription will be applied to contracts made out of the State, when sought to be enforced in our courts.

The prescription of the forum or place where the remedy is sought, must govern in all suits for the collection of debts. But this rule does not conflict with the well recognized doctrine, that a title to movable property complete in the party, acquired by prescription resulting from possession, or otherwise, will enable him to recover the same, in a State other than that in which the right of ownership has been thus acquired.

A surety on a note, when sued in Louisiana, cannot defeat the action by showing that the principal debtor had sustained a plea of the statute of limitations, to an action brought on the same note in Mississippi.

Where the note sued on was made in the State of Mississippi, and payable there, the obligations created by it must be tested by the laws of that State; and whatever acts of the parties which operate an extinguishment of the contract there, will undoubtedly prevent a recovery elsewhere.

An agreement to give time to the principal, which will discharge the sureties, under the laws of Mississippi, must be a positive and binding agreement, with the principal, for a definite time, based upon a valuable consideration, sufficient to tie up and restrain the creditor during the time for which the indulgence is given; and the consideration must be such that it can be enforced in a court of justice.

BACON  
v.  
DANLORREN.

It is the intention of the parties to an instrument which renders it negotiable, if expressed in terms which may have that effect, and any terms expressing the intent will render the bill or note negotiable. *Preston, J., dissenting.*

The note sued on, although not payable to order or bearer, is negotiable, under the laws of Mississippi, and the prescription of five years is a bar to an action brought on it in this State. *Preston, J., dissenting.*

Where the principal debtor is discharged the surety is also discharged. *Preston, J., dissenting.*

**A**PPEAL from the District Court of the Parish of Tensas, *J. N. T. Richardson, J.*

*Stacy and Sparrow, for plaintiffs.* This question has been settled against the defendant, by the Supreme Court of the United States in the cases of the *Planters' Bank v. Sharp et al.* and *Baldwin et al. v. Payne et al.* 6 Howard's Rep. 301 to 344. The doctrine established by those decisions has been since adopted and followed by the High Court of Errors and Appeals of the State of Mississippi. 9 Smedes and Marshall's Rep. 394; 10 Ib. 434; 11 Ib. 573; and is embodied in, and constitutes a part of the jurisprudence of that State.

As no evidence has been introduced in support of this objection, nothing is necessary to be said upon it.

The obligation is not payable to order or bearer, and not negotiable by the commercial law, or the laws of Louisiana. We suppose, that after examining the decisions reported in 3 Ann. 220, 4 Ann. 234 and 127, and arts. 3505 and 3508 of the Civil Code, the most sceptical will admit, that the prescription of ten, and not five years, or the prescription of six years, in Mississippi, applies to the obligation sued on.

We have examined, and answered, as we hope, successfully, all the defences pleaded by the defendant in the district court. He, however, attempts to show, in the argument of the case, that the plaintiffs are not entitled to recover, because they have given time to the principal debtor for the payment of the debt without the consent of the sureties. To this the plaintiffs reply, that no such objection has been made, or defence filed; which, if the party possessed, he was bound to plead specially by way of exception, in order to avail himself of it. This is the established and universal rule of practice. Code of Practice, arts. 345, 346. And a judgment is illegal, based on an exception not pleaded. 10 L. R. 169. Peremptory exceptions must be specially pleaded. 3 R. R. 360 and 440. An exception, that the party has been released by the granting of an extension of time given, must be specially pleaded in the lower court, or it will not be noticed in the Supreme Court. If not made, it is presumed to have been waived. *Gas Bank v. Hudson*, 5 R. R. 486. And this exception, to be valid and tenable, must state that the extension of time was given without the consent of the defendant. *Gordon v. Dreux et al.*, 6 R. R. 406. *Green v. Branda*. 1 Walker's Miss. Rep. 372. No such exception having been filed, or notified to plaintiffs by the defendant, he cannot take the plaintiffs by surprise, by setting it up verbally.

But, if the defence had been regularly made, it would not have released the defendant. The obligation sued on, was both executed and made payable in Mississippi. It was essentially a Mississippi contract in everything relating to it, and must, as to everything, except prescription and as to remedies for enforcing it, be governed exclusively by the laws of that State. Story's Conflict of Laws, No. 331, 332, 340, 342.

Now, notwithstanding the decisions of this honorable court in the cases of *Morton v. Halsted*, 1 Ann. 192. and *Adlé v. Metoyer*, Ib. 259, which were based upon our Civil Code, it is certain, that under the jurisprudence of the common law, in order that the giving of time by the creditor to the principal debtor, without the consent of the surety, should operate a release of the latter; it is necessary that there should be a consideration given, paid, or promised, for the extension. If given without, the agreement to give time is *nudum pactum*, and the surety is not released. This consideration may be of various descriptions, by changing the debt; by taking further collateral security; by receiving a part of the debt in cash, or by stipulating, that a consideration or bonus should be paid for it, &c. But, to have the effect contended for, it is necessary that there should be a valuable consideration. It is so laid down by all the common law writers on the subject. 3 Kent's Com. 111, 112. Bailey on Bills, 360.

*Planters' Bank v. Sellman*, 2 Gill and Johns. 230, which is a case precisely in point. Story on Promissory Notes, Nos. 412 to 422, who decides that a party bound *in solido*, although *inter se* he may be a surety, will not be discharged by any agreement to give time to one of the other parties. The authorities are reviewed, and the same doctrine sustained by the Supreme Court of the United States in the case of *Lemore v. Powell*, 12 Wheaton's Rep. 555. The High Court of Errors and Appeals of Mississippi, from the date of its organization to the present time, presents an unbroken chain of decisions establishing and confirming the same doctrine in its fullest extent. 4 Howard's Miss. Rep. 690. 5 Ib. 633. 3 S. and M. R. 647. 7 Ib. 522. 9 Ib. 474. 10 Ib. 344. 12 Ib. 535, and the authorities cited in said decisions. To produce a release of the security four things must concur: 1. A promise to indulge. 2. That promise to indulge, must be definite as to time. 3. "A consideration, for without it, a promise to indulge is not binding." 4. That the surety has not assented. "There must be some arrangement or dealing between the principal debtor and creditor, which operates as a fraud upon the surety." A mere consent to delay payment, cannot be so considered. 4 Howard's Rep. 693.

Now, what are the facts of the case before the court? *Mrs. Ellis* was personally liable for the payment of the note; *Dahlgreen*, by marrying her, became, under the common law, also personally bound for it, and so expresses himself in his letter, dated the 29th March, 1842, and wishes to make arrangements to pay it. He was no original party to the contract, but since its inception, by marrying one of the parties, became liable under it. It was to him, and not to his wife, or to any other person, that the promise of indulgence was given. All the original parties to the obligation remained *in statu quo*. There was no promise to indulge them. But *Dahlgreen* offered to secure the debt by a valuable collateral security—a mortgage on one hundred and forty slaves, if the indulgence were granted. It was not received or taken by *Roberts*; there was merely an understanding, based on no consideration whatever, that he, *Dahlgreen*, should have six years within which to pay the debt. The case is fully covered by the decisions before quoted, and the sureties, if being bound *in solido*, they can be called such, were not released. Besides, any contract with *Dahlgreen* to extend the time as to him, who was not an original party, could not have that effect.

Defendants have offered in evidence, the statute of limitations of Mississippi, as to claims against estates. He has not plead that the claim was either barred or extinguished. If the statute is to be considered simply as one of limitations, it will not govern the case, but the *lex fori*. The decision in *Harrison v. Stacy*, 6 R. R. 15, is palpably wrong, and has been disregarded by the Circuit Court of the United States, in *Nicholson v. Marders*. If the statute is relied upon as operating an extinction or release of the debt, it should have been specially pleaded; and not being so pleaded, cannot be noticed. See authorities before quoted.

But the obligation sued on or not declared as sued on, as a claim against the estate of *Ellis*. True, it is stated that the note was given for a debt of the estate of *Ellis*; but the estate is not sought to be made liable; neither is *Mary M. Ellis*, as administratrix. But it is alleged, that by signing it, she became personally liable to pay it, and the suit is brought against her individually. That she was so liable, see the following authorities: 2 Howard's Miss. Rep. 851. 3 Ib. 176. 6 Ib. 371. 1 S. and M. Miss. Rep. 666. 3 Ib. 425. The statute could not, of course, apply as to individual liability.

*Benjamin and Micou. H. B. Shaw and S. R. Walker*, for defendants. In *Lacoste v. Benton*, 3 Ann. 220, the court decides that, prescription of ten years only can be invoked, on a similar instrument. This decision is based upon that of *Bank of United States v. Donally*, 8 Peters 373, but we think the cases are distinguishable.

The Virginia statute relied on in 8 Peters, applied to all obligations for the payment of money, other than specialties, or sealed instruments. It is clear that the instrument in question was not a sealed instrument, and the law of Kentucky giving it the effect of a sealed instrument, did not make it one. The case was therefore properly decided. It was a decision on the law of limitation wholly, and the *lex fori*, according to the admitted principle, governed. The instrument was not within the description of the law for the longer term of limitation, and therefore fell under the short term.

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But, in this case, we think the instrument sued on is within the description of art. 3505. Not only notes and bills to order, but all effects, that is, obligations negotiable, or transferable by endorsement or delivery are embraced.

It is obvious that there is a preliminary question, before the law of prescription arises. You must first ascertain the nature of the instrument, its character, &c., before you can determine what prescription applies. The nature of the instrument, and the obligations it imposes on the maker, are questions not necessarily governed by the *lex fori*. After the instrument has been classed, then the prescription is applied according to the law of the former.

The first question then, is: Is the note sued on, an obligation transferable by endorsement or delivery, in Louisiana?

It is made so by statute of Mississippi, where the contract took place. The statute of 1822 declares, that all obligations for money, whether payable to order or not, may be assigned by endorsement, and that the assignee may sue in his own name. Hutchinson's Dig. 640.

The note in question is made under that law, and the question arises, whether its negotiability or assignability is not inherent in the contract, so as to make it equally assignable everywhere else. In other words, whether the quality of negotiability is not a part of the contract? If I promise to pay \$100 to A, and the law gives to A power to assign the obligation, by endorsement, do I not promise to pay to A or his assignee?

The precise question is put by Judge Story, but he does not treat it as one settled by authority. He evidently inclines to the opinion, that the negotiability is inherent in the contract. "It may be truly said," says this writer, "that the transfer is entirely in conformity with the intent of the parties, and to the law of the original contract." Story on Bills, § 174.

The reverse of the proposition, that an endorsement in blank, which does not by the law of France, transfer the property in the note, will not be held in England to transfer it, has been held in England. *Trimby v. Vignier*, 1 Bing. New Cases, 159, (27 Eng. Com. Law Lib.) and the decision is quoted and approved by Judge Story, because the right of action relates "not to the form of the remedy, but to the interpretation and obligation of the contract." Story's Conflict, § 316, a. And to the same point in § 253, a.

The code declares that any debt is assignable, and on any credit whatever the assignee may sue in his own name. The transfer is complete between the parties by the giving of the title. Code, 2612. What is the title referred to seems ambiguous. If the obligation is in writing, the delivery of the obligation would satisfy the language of the law. If not in writing, then the written transfer may be regarded as the title. But the authors tell us that a credit, a debt, a *créance*, may be transferred, either by authentic act, *sous seing privé*, or verbally; the transfer is complete, by the simple consent as to the thing and the price. 16 Duranton, 492.

*Cession et transport* are synonymes, and the cession of credits is, in general, governed by the same rules that apply to the sale of corporeal objects. 2 Zachariæ, 551-2.

The transfer, (*transport*,) like all other sales, is perfect between the parties by the mutual consent as to the object and the price. Troplong, *vente*, n. 890. The delivery is made "*par la remise du titre*," which is the mode pointed out for delivery of incorporeal rights; but this is not necessary to transfer the title for this the mere consent or agreement is necessary. "*Ce résultat est déjà obtenu par le consentement*." Code, 1583. Ib. 881.

So in the Dict. de Droit Come., title *Transport, Cession*, it is said that a debt, a share in a partnership, or any other incorporeal right, may be sold like any movable object. The title, *le titre*, must not however be mistaken for the debt, of which it is only the proof, and its delivery is not, in general, sufficient to transfer the property, so far as third persons are concerned, "*à l'égard des tiers*." It is therefore sufficient so far as the parties are concerned.

The same book teaches, that the above is the general rule, applicable where the law has not provided some other mode of transfer. Now, as to bills of exchange, by the *Code du comm.*, a. 137-8, they pass by special endorsement, but not by general endorsement; this will account for the case cited in Story's Conflict, § 316, a. (above.) As to these instruments there is a special law, and the mere endorsement of the name of the payee does not import a transfer. But in the absence of any special law, the general principles laid down in the code apply, 1st. Not only corporeal objects, but incorporeal, such as a debt, an



inheritance, a servitude, or other rights, may be sold, a. 2424. 2d. The transfer, as between the parties, is complete by the giving of the title; a. 2612.

We have not yet referred to the effect of the words negotiable and payable at, &c. Here, again, we are so unfortunate as to encounter the opinion of the court in *Young v. Crossgrove*, 4 Ann. 235.

It is well settled that no precise form of words is necessary to make an obligation negotiable. Any form, indicating the intention to give it a negotiable character, is sufficient. *United States v. White*, 2 Hill, 61. Chitty on Bills, 159, 195, (ed. 1842.) Story on Notes, 15, 44.

In the case of *Crossgrove*, the court reads "negotiable" and "payable" as synonymous; in other words, the word "negotiable" is expunged.

The word negotiable is sometimes used to convey an idea expressing something more than mere negotiability, to wit, negotiability without being open to equities and defences. The negotiability is merely and simply its transferable quality; that quality may remain whether the equities between the original parties be admitted or not. Thus, a note is negotiable after maturity, though if received after protest, it is open to defences. Story on Notes, § 180.

An endorsement, annexing a condition, does not affect the negotiability, but it gives notice of consideration and admits the equities. *Tappan v. Ely*, 11 Wend. 362.

The very rule of the law merchant, that the consideration may be inquired into unless the bill has passed, without notice for value, and in the ordinary course of trade, shows that the mere transferable nature of the bill, is only one of the elements constituting its security as an object of commerce. In all suits between the original parties, defences arising out of the consideration are heard, but the hearing of these defences does not impugn the character of the instrument. It may be negotiable, although never negotiated.

The question, whether a debt barred by limitation in the State where the contract was made, and where the parties resided, until the full term of limitation expired, can sustain an action in another State, to which the defendant may afterwards remove, may be regarded as an unsettled question. Judge Story expresses the opinion that the action cannot, in such case, be maintained. His opinion has been followed in Alabama; and Troplong considers a debt extinguished and at an end by the expiration of the term for prescription. 8 Porter's Rep. 1 Troplong, Prescription, n. 29. Story's Conflict. 4 Mason's Rep. &c.

That a difference exists, for many purposes, between the effect of limitation before and after the term has expired, is undeniable. Thus: prescription does not run against the United States, and yet if a debt, already prescribed, be transferred to the United States they cannot recover, because the right to the limitation was fully acquired. *United States v. Buford*, 3 Peters, 30. *United States v. White*, 2 Hill, 61. So, if a debt be barred, the acknowledgment of a partner or a debtor, *in solido*, will not revive it as to another partner or debtor. *Davis v. Houren*, 6 R. R. 256. Comstock's Rep. 523, &c.

It is also fully established, that a title made perfect by prescription in one country, is good everywhere else. *Shelby v. Gay*, 11 Wheat. 361. *Broh v. Jenkins*, 9 M. R. 557. Story's Conflict, 581.

The opinion of Judge Story, however, respecting the effect of limitation, has not generally been followed by the courts. The courts of Massachusetts decide the reverse, and the point is said to have arisen in *The Union Manufacturing Company v. Lobdell*. 7 N. S. 108, although it does not appear by the report of the case, that the precise question presented by Judge Story was considered. In the case of *Broh v. Jenkins*, 9 M. R., the question is noticed but not decided. It must therefore be admitted, that the opinion of Judge Story and of Troplong, are not sufficiently sustained by judicial decisions to be relied upon as authority.

There is, however, a proposition which is discussed by Judge Story, and in which he is fully supported by the courts; it is, that if by the terms of the statute *loci contractus*, the debt is really extinguished; then, a debt extinguished by the statute, is extinguished everywhere. This proposition received the assent of the English judges in *Hulen v. Steiner*, 2 Bingham, N. C. 202, (29 Eng. Law Lib.) and in our late Supreme Court in *Harrison v. Stacy*, 6 R. R. 16. The counsel for appellant say this decision was palpably wrong, and was disregarded by the Circuit Court of the United States in *Nicholson v. Marders*. He has not favored us with a reference to the report of this decision, and we have been unable to find it. We believe, however, that the proposition, so far from being wrong, is clearly correct.

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Now, what is the difference between the two opinions of Judge Story, to which we have referred? It seems to be this: the first opinion cited is, in substance, that of Troplong, that the law of limitation of itself extinguishes the debt; the second is, that if the debt be admitted to be extinguished where contracted, it must be held to be extinguished everywhere else.

In the common law authorities a judgment is always said to be conclusive until reversed; hence the possibility of reversal does not prevent its being held conclusive. See several cases cited in 2 Supt. U. S. D. 230, Nos. 281 and 299. *Warburton v. King*, 1 McLean, 460. 3 Peters, 203. So Kent speaks of a judgment pronounced, and carried into effect, as conclusive." 2 Kent, 120; and the courts in Mississippi give to the judgment of any competent court the presumption of correctness. 1 Howard, Miss. Rep. 163. 2 U. S. D. 644, n. 144, 145, 146. No. 151, p. 649, n. 259, 261, 266.

Judgment against principal conclusive as to the default against the sureties. *Ib.* 650, n. 270.

By the court:

EVERTS, C. J.\* This appeal is taken by the plaintiffs, who are trustees of the late Bank of the United States, from a judgment rendered against them in favor of the defendant, *John Routh*, in the court of the Tenth District, sitting in the Parish of Tensas.

The suit was brought for a large balance, alleged to be due by *Routh* and others, on a written obligation to pay to the President, Directors and Company of the Planter's Bank of Mississippi, the sum of \$63,945, on the first of March after date, &c. The instrument was signed by all the parties, and bears date, Natchez, June 27th, 1839, and is there payable.

The objections taken by the counsel, for the defendant and appellee, against the right of action on the part of the plaintiffs, under the assignment of the obligation sued, we think untenable.

The judgment rendered in the court of chancery, in the State of Mississippi, on the demurrer of the defendants, *Dahlgreen* and wife, which is pleaded by the defendant, *Routh*, as *res judicata* in the present suit, we are of opinion, is no bar to the plaintiffs' action; because, beside other reasons, the case in which said judgment was rendered, is now pending on an appeal taken from said judgment, by the plaintiffs.

The argument of the counsel for the defendant, has been directed to the discharge, under the statute of limitations of Mississippi, which is alleged to limit the right of action, on instruments of this kind, to the term of six years. It is said, that the action was barred, by lapse of time, against the principals contracting the obligation, and that no action can be maintained on it, against the defendant and appellee, who was a mere surety.

Under our laws, an instrument of this kind would be prescribed, by the lapse of ten years from its maturity, and this prescription is applied to contracts made out of the State, when sought to be enforced in our courts. *Benton v. Lacoste*. 3 Ann. 220. *Young v. Crossgrove*, 4 Ann. 234. *Graves v. Routh*, *Ib.* 127.

We have considered the objections made by counsel, to the character of the obligation sued on, in reference to our law of prescription. Most of them were presented on the argument of the cases of *Lacoste v. Benton*, and of *Young v. Crossgrove*, and we are confirmed in our original impression, of the correctness of the doctrine there established.

It seems to be conceded, that *Routh* bound himself as a surety only, the note having been given for the benefit of the succession of *Ellis*, with which *Routh* had no connection.

\*Judgment, in this case, delivered on the 26th of April—decree rendered on the 9th of November.

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Although the judgment rendered in the court of chancery alluded to, is not technically *res judicata* between the parties, it is referred to by the counsel for the defendant, as a correct exposition of the effect of the statute of limitations of Mississippi, upon the obligations of the parties to the instrument sued on. It decides, in so many words, that the several payments made are not sufficient to prevent the operation of the statute, and that the plaintiffs' claims are barred thereby. The demurrer of the defendants is accordingly sustained, and the plaintiffs' bill dismissed.

But the counsel has failed to show that, by the law of Mississippi, all right of action against the defendant was extinguished, by the action of the plaintiffs on the note having been barred by the statute of limitations of that State, supposing the decision of the court appealed from to be a correct exposition of the law; and, as we are advised, such would not be the effect of the decision, supposing it to be final. Angell on Limitations, § 22. *Cone v. Colburn*, 7 New Hampshire Reports, 368. *Kerr v. Branden*, 2 Howard, 910. *Johnson v. The Planter's Bank*, 4 Smedes and Marshall's Report, 165. *Cohen v. Commissioners of Sinking Fund*, 7 Ib. 437. It must be borne in mind that *Routh* was not a party to the suit in chancery, he not having been served with process; the suit was against the principal debtors alone.

Nor is the advantage to the defendants cause perceived, in the establishment of the legal proposition, that the claim against the defendant must be governed by the statute of limitations of Mississippi, since the fact of the residence of *Routh*, in Louisiana, is not contested, nor is there any thing in the evidence which would subject the claim against him to the operation of that statute. Hutchinson's Miss. Code, p. 827, § 12. The claim of the plaintiffs is, therefore, unimpaired, either by the judgment rendered in the court of chancery of Mississippi, in favor of the principal debtors, or by the statute of limitations of Mississippi.

As the question has been argued before us, as to the applicability of the laws of this State, and of Mississippi, to the right of the plaintiffs to recover, by reason of the lapse of time, we take occasion to state, that we think it settled, by the highest authority, that the prescription of the forum or place where the remedy is sought, must govern in all suits for the recovery of debts. It was so determined in this State, after full argument, in the case of the *Union Insurance Co. v. Lobdell*, 11 Martin, N. S. 108. Such has been the established rule in the United States, and in the courts of Westminster Hall. 3 Johnson's Rep. 267, *Ruggles v. Keeler*. 3 Johnson's C. C. 218, *Decouche v. Savetier*. *Williams v. Jones*, 13 East. Rep. 439. 4 Cowan Rep. 530, *Andrews v. Heriot*, and cases there cited. 2 Mass. 84, *Pearsall v. Devignt*. *McElmore v. Cohen*, 13 Peters' Rep. 327, and numerous other more recent decisions.

It is sufficient to cite, among the civilians, Huberus, Merlin, Boullenois, and Voët, to the same effect. Huberus' Jurispr. Univers. lib. 3, ch. 2, § 34. Merlin Rep. *Verbo* Prescription, sec. 1, § III, No. VII. Voët, Commentary on the Pandects, lib. 44, tit. 3, No. 12. Merlin, *Questions de droit, Verbo* Prescription. It is not only thus settled by authority, but expressly provided in the Code of Practice, art. 13.

We do not consider that this rule conflicts with the well recognized doctrine, that a title to movable property, complete in the party, acquired by prescription, resulting from possession or otherwise, will enable him to recover the same, in a State other than that in which the right of ownership has been acquired. *Shelby v. Guy*, 11 Wheaton, 373. *Frierson v. Erwin*, 5 Ann. 530.

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It is further contended, that *Routh*, the defendant, is released from all responsibility as a surety, in consequence of time having been given by the plaintiffs to the principal debtors. It appears that this note originally belonged to the Planter's Bank of Mississippi, and was given by *Mrs. Ellis*, for a debt due by the succession of her husband. She afterwards married *Dahlgreen*, who, under the laws of Mississippi, became responsible for the debts of his wife, by the fact of his marriage. The Bank of the United States being a large creditor of the Planter's Bank, agreed to receive the amount of the indebtedness in bills receivable and notes owned by the latter. This note was among the number. Before it was taken by the plaintiffs, representing the Bank of the United States, *Dahlgreen* addressed a letter to their agent, in which he stated his wish to make arrangements for the payment of the note. He offered as security, a mortgage on one hundred and forty slaves. He states, "I think the time ought not to be less than six annual installments. When I return to town I will see you again, as it will require some time to complete the arrangements." The agent declined receiving the mortgage proposed by *Dahlgreen*, considering the note, as it then stood, made the debt more secure than it would be by changing it, and recinding the mortgage, but acceded to the proposition for the terms of payment. *Dahlgreen* made three payments; the last was in February, 1843, but none since, though repeatedly applied to. It appears, also, that in the agreement under which this note, with others, was received by the plaintiffs from the Planters' Bank, it was stipulated, "that an extension of the time was to be granted to the parties to the paper transferred, of one to three years, from January, 1842, in equal annual payment, provided the security offered should be ample."

There does not appear to be any other fact, which it is material to notice, which relates to the granting of time.

Does this granting of time operate a release of the surety from his suretyship, he having given no consent to any extension of the time of payment?

By our laws, the prolongation of the term granted to the principal debtor, without the consent of the surety, operates a discharge of the latter. Code, 3032. The civil law was otherwise, and the principle has been preserved in the article 2039 of the Napoleon Code, which provides, that the extension of the term of payment granted by the creditor, does not release the surety, who may, in such a case, himself sue the debtor, in order to compel him to make payment. Pothier on Obligations, No. —.

As the note sued on was made in the State of Mississippi, and is payable there, the obligations created by it must be tested by the laws of that State; and whatever acts of the parties which operate an extinguishment of the contract there, will undoubtedly prevent a recovery elsewhere. The act, from which it is said this discharge of the surety results, was done there, and in relation to persons there present. As to the effect of this act upon the right of the parties to the contract, those laws are alone to be considered.

As far as we are able to collect the rule of law on this subject, from the jurisprudence of that State, it seems to be uniformly settled, that there must be a positive and binding agreement, with the principal, for a definite time, based upon a valuable consideration, sufficient to tie up and restrain the creditor during the time for which the indulgence is given, or it will not discharge the surety. And the agreement for delay, which will discharge the surety, must be founded upon a sufficient consideration, and be such as can be enforced in a court of

justice. *Payne v. Commercial Bank of Natchez*, 6 Smede and Marshall's Reports, p. 24. *Newell v. Hamor*, 4 Howard's (Miss.) Rep. 684. *Wade v. Stanton*, 5 Howard, 631. *Wellington v. Gary*, 7 Smede and Marshall's Rep. 533.

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In a case where the principal debtor urged the creditor not to sue, promising that, if he did not, he would pay the debt in a given time, and the holder did not sue, the surety was not held to be discharged. Nor will the mere voluntary promise to forbear, on a renewed assurance that the party will pay that which he is already bound to pay, where there is no other new consideration, discharge the surety. *Montgomery v. Dillingham*, 3 Smede and Marshall's Rep 647.

There are several other cases referred to, in the brief of the counsel for the plaintiffs, to the same effect, which afford to us an established rule, which it only remains to apply to the facts of this case.

Some explanation must be given of the law of Mississippi, relating to the subject of the consideration of agreement, which we assume to be in accordance with the elementary writers of the common law.

All contracts are, by the laws of England, distinguished into agreements by specialty, that is, under seal, and agreements by parol. If the agreement is merely written, and not a specialty, the consideration must be proved. To make a contract or agreement obligatory, the consideration must be either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made; otherwise the contract or agreement is considered as *nudum pactum*, and cannot be enforced.

It seems to us obvious, that there was no sufficient consideration, in this sense, in the consent of the plaintiffs' agent to give *Dahlgreen* time for the payment of this debt, and that, there being no consideration proved, the plaintiffs were not prevented from enforcing the payment of the note immediately, by any thing that passed between their agent and *Dahlgreen*.

Since the preparation of this opinion, a decree of the Court of Errors and Appeals of Mississippi, has been submitted to us, which affirms that of the vice chancellor, in the case mentioned in this opinion; but, under the view we have taken of the effect of such a decree on the rights of the appellee, it operates no change in the conclusions to which we have arrived.

In conclusion, we consider that there is no sufficient defence to the plaintiffs' action, and that they are entitled to judgment.

For the reason assigned in the written opinion of the court, read on the 26th of April last, and on file, It is ordered, adjudged and decreed, that the judgment of the district court be reversed; and it is further ordered and decreed, that the plaintiffs recover from the defendant, *John Routh*, the sum of \$47,185 24, with eight per cent interest thereon, till paid, since the thirty-first day of January 1843, and the costs in both courts.

PRESTON, J., dissenting. This suit was instituted on the 27th of December, 1849, against *John Routh*, residing in the State of Louisiana, on the following instrument assigned to the plaintiffs:

"\$63,945. Natchez, January 27th, 1839. On the first of March after date, we, or either of us, promise to pay the President, Directors and Company of the Planters' Bank of the State of Mississippi, for value received, sixty-three thousand nine hundred and forty-five dollars, payable and negotiable at the Planters' Bank of the State of Mississippi, at Natchez. MARY M. ELLIS, Adm'x. of *J. G. Ellis*, deceased; JOHN ROUTH; ELIAS OGDEN."

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There are credits on the note. The last is endorsed the 25th of February, 1843. It is not pretended that there is any later acknowledgement of the defendant's liability. There was suit instituted in the State of Mississippi, against parties to the note, in January, 1849. So that, neither suit nor acknowledgement interrupted the prescription of five years, which is plead under article 3505 of our code against the present action upon the note.

The note was given by the Administratrix of an estate, and it is supposed that *Routh*, the present defendant, is only a surety on the note. A suit in equity was instituted in the State of Mississippi, against the estate, in January, 1849, and it was decided by the chancellor that a recovery was barred by the statute of limitations. An appeal was taken, which remains undecided. This court having equitable powers, I do not think that judgment should be rendered in this case against the defendant, until the suit in the State of Mississippi is decided. Otherwise, it might be decided that the obligation is extinguished as to the principal, but in full force against the surety; for the statute of limitations of the State of Mississippi, like prescription under our code, extinguishes the legal obligation of a contract. This would conflict with our principles and laws, providing that the suretyship cannot exceed what may be due by the debtor, nor be contracted under more onerous conditions, and that the surety may require the creditor to discuss the property of the principal obligor. Civil Code, art. 3006, 3014.

I am, moreover, of opinion, that the note sued upon is prescribed by art. 3505 of the Civil Code. It prescribes, "Actions on bills of exchange, notes payable to order, or bearer, except bank notes, those, on all effects negotiable, or transferable by endorsement or delivery, are prescribed by five years, reckoning from the day when these engagements were payable." The action on the note is therefore prescribed, if it be a negotiable instrument.

An instrument is negotiable which can be transferred by an endorsement on the back, so as to enable the assignee to sue for its contents in his own name. It should, further, not be subject to the equitable assets of the obligor, a qualification, which will be noticed as to the note in controversy. A statute of the State of Mississippi prescribes, that "All bonds, obligations, bills, single promissory notes and all other writings for the payment of money, or any other things, shall and may be assigned by endorsement, whether the same be made payable to order, or assigns of the obligee, or payee, or not; and the assignee, or endorsee, shall and may sue in his own name, and maintain any action which the obligee, or payee might or could have sued or maintained thereon, previous to assignment."

The note was thus made negotiable by statute, in the State where it was executed. It is said it was still not negotiable, because the obligor could plead any offset against the payee. He could, under this statute, to the time of assignment, but not afterwards.

It was held by the High Court of Errors and Appeals of the State of Mississippi, in the case of *Oldham v. Ledbetter*, 1 How. Rep. 46, that by this statute, "promissory notes may be assigned by endorsement, though the same be not made payable to order; and by the principles of the common law, they are transferable by bare delivery. In either case there has operated a complete divestment of all rights to the contents of the note, and of all authority to control their appropriation on the part of the payer. In one case, the assignee is clothed with authority to sue in his own name; in the other, the transferee is empowered to use the name of the payee to consummate his equitable interest by a collec-

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tion of the money. The service of garnishment will not after transfer, though without notice, subject the debt due, by the maker, to the demand of the attacking creditor; for, as by assignment or delivery, the party into whose hands the note may come, is instantaneously vested with an absolute right to control its contents; the payer from that moment becomes the debtor of the holder, and responsible to him alone. The process of attachment cannot restore a relation which has ceased to exist, or appropriate rights of one individual to a discharge of the obligation of another. If this position should require aid from authority, a decision of the Supreme Court, Walker's Reports, 389, made in reference to the existing laws on this subject, will be found fully to sustain it." Under this decision, the negotiability of the note, after its assignment, was substantially established as to the maker, free of his subsequent equities, and I do not find it reversed. It can never lie in the mouth of the assignor or endorser, to say the instrument was not negotiable, because the payer might have equitable offsets against him before he assigned the instrument, and it was negotiable as to the holders, because it is not pretended by them that, in point of fact, there were any offsets against the note when it was negotiated to them. They also have the guarantee of the jurisprudence settled by the decision quoted.

The defendant pleads the negotiability of the instrument against the bank that negotiated it, and assignees to whom it was negotiated. They cannot deny its negotiability; the first, because the statute and their acts made it negotiable, and the last, because, in point of fact, the instrument had every negotiable quality. Besides, for the very purpose of negotiating it, the parties made it negotiable in terms.

It is the intention of the parties to an instrument which renders it negotiable, if expressed in terms which may have that effect. And any terms expressing the intent, will render the bill or note negotiable. Chitty, 181. 1 Pard. 360-361.

It is laid down by elementary writers, that no form of words is absolutely necessary, to produce that effect. Making the instrument payable to order, is the usual form. But if the parties declare on its face that the instrument shall be negotiable, it should have that effect, as clearly as it can be implied, from the use of the word "order." Any words, from whence it can be inferred, that the person making the bill, or note, or any other party to it, intended to be negotiable, will give it a transferable quality against that person. Chitty, 219, ed. of 1836.

The bank required the defendants to give them a note "negotiable at the Planters' Bank of Mississippi, at Natchez," for their debt, and the debtor did so. This was undoubtedly intended to enable the bank to transfer it by endorsement, if she chose, so as to enable her assignees to sue in their own name; to do precisely what has been done. The instrument has been assigned, so as to enable the assignees to sue in their own name for the whole debt. That embraces every requisite to the definition of negotiability.

It is a principle of the interpretation of all instruments, to give every word in them effect, if possible. The term "negotiable," in the note under consideration, would have no meaning, if the note was not negotiable. But it can and has meaning and effect, because the note has been transferred by endorsement, and the endorsees have every right and power which belonged to the payees. That makes the negotiability of the instrument.

There has been but a single adverse decision, by this court, in the case of *Young v. Crossgrove*, 4 Ann. 234. It is a question of evidence, and of the

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construction of an instrument of writing, not a question of law, and, therefore, I do not feel bound by the precedent.

The instrument, in my opinion, was, in Mississippi, by express statute, and is, in Louisiana, by its terms, negotiable, and the action on it is prescribed by our code, which prescribes actions on negotiable instruments, by the lapse of five years between their maturity and the commencement of a suit.

I think the judgment of the district court should be affirmed, with costs.

Application for a re-hearing refused.

### GAUCHE v. TRAUTMAN.

A person who buys a lease at a judicial sale, is not entitled to recover rent accruing after the sale, out of the funds produced by the sale.

A party who procures a sale, will not be permitted to complain of any ambiguity in its terms.

**A** PPEAL from the First District Court of New Orleans, *Larue, J. Cyprien Dufour*, for plaintiff. *M. M. Cohen, H. St. Paul and F. C. Laville*, for defendant.

The facts of this case bearing on the point on which it was decided by the Supreme Court, are thus stated by Judge Larue:

"This is a rule for the distribution of funds in the hands of the sheriff, resulting from a sale of certain movables seized and sold in the case of *John Gauche v. Mr. and Mrs. Trautman*. The amount in the sheriff's hand is \$670 72, and the only question is, who of the claimants is entitled to it, and to what amount? On the 21st of April, 1851, *Gauche* obtained a judgment for \$320, an amount of rent then due for the months of February and March, and a further judgment for the sum of \$960, payable at the rate of \$160 a month, up to the 1st day of October, 1851; and a further judgment for the sum of \$220, with vendor's privilege upon the fixtures in the store.

"The fixtures were sold for the sum of \$34, and were bought by the plaintiff in the suit. To that amount he is entitled.

"After the judgment was rendered, he caused to be seized, and had sold, on the 16th of June, the lease of the premises, for the rent of which he had previously obtained judgment, which he bought himself, for the sum of \$50."

By the court:

SLIDELL, J. Considering the judicial sale of the lease, and its purchase by the appellant, we are of opinion, that the court below did not err in refusing to allow him, out of the monies distributed under the sale, rent accruing after the 16th June, 1851. According to the terms of advertisement, the purchaser of the lease was to pay rent accruing after such purchase. Such it seems would have been the obligations imposed on any third person who might have purchased. Even if there was an ambiguity in the terms of sale, the appellant, who procured the sale himself, ought not to be permitted to complain on that score, as the matter now stands.

Judgment affirmed, with costs.



DAVID GRANGER, Owner of Ship Epaminandos, v. CAMPBELL  
AND RICKARBY, et al.

The privilege for freight, conferred by article 3213 of the Civil Code, extends only to goods of which the Captain has, or has had, possession.

**A**PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Josephs*, for plaintiff. *Gould, Wolfe and Singleton*, and *Benjamin and Micou*, for defendants.

By the court:

SLIDELL, J. The plaintiff is owner of the ship *Epaminondas*; and this suit grows out of a contract made by *Gifney and Lovell*, brokers for one *Simpson*, to furnish cargo to the amount of one thousand bales of cotton, at a stipulated rate of freight. After two hundred and five bales had been delivered to the ship, *Simpson* absconded, leaving his vendors, *Bradley, Wilson & Co.*, unpaid. Part of the cotton was still in the cotton press, and the ship had acquired no control over it. The whole of the cotton, both that on ship-board and that in the cotton press, was seized, under writs sued out by the vendors and by *Campbell and Rickarby*, who had made *Simpson* advances upon it. Meanwhile freights declined, and the vessel, being disappointed as to the shipment of the seven hundred and ninety-five bales, had to make up her cargo at reduced rates. The plaintiff insisted that he had a privilege upon the two hundred and five bales, for the loss of freight; and, to avoid injury to all parties by the delay of the ship, in consequence of the seizures, it was agreed that the two hundred and five bales shipped, should be bonded, and go forward in the vessel, the proceeds to be subject to the ship's lawful claims. In the litigation which followed between *Bradley, Wilson & Co.* and *Campbell and Rickarby*, those proceeds were awarded to the latter, (7 Ann. —,) and the plaintiff now looks to them for the payment of his claim of damages. The freight of the two hundred and five bales has been paid.

We find no ground for any claim against *Campbell and Rickarby* directly under the agreement to furnish cargo; for that agreement was made with *Simpson*. There was no privity of contract between the plaintiff and *Campbell and Rickarby*.

Then the only question remaining is, whether the plaintiff has a privilege upon the two hundred and five bales actually shipped, for the damages arising from *Simpson's* failure to ship the seven hundred and ninety-five bales. We think it clear he has not.

The article 3213 of the Civil Code declares, that "The captain has a privilege for freight during fifteen days after the delivery of the merchandise, if it has not passed into third hands. He may even keep the goods, unless the shipper or consignee shall give him security for the payment of the freight." The privilege thus conferred extends to goods of which the captain has, or has had, possession. Here the captain never had possession of the seven hundred and ninety-five bales.

Judgment affirmed; costs of appeal to be paid by appellant.

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### VINCENT AICARD v. ANDREW DALY. Rule on JOHNSON to cancel a Mortgage.

The probate sale of the separate property of the wife, made for the purpose of paying her debts, and of settling her succession, has the effect of canceling all the mortgages, existing in her name on the property sold. The curator, who administers the succession of his deceased wife, may purchase property at the probate sale.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Livingston, for Johnson. Warfield, for plaintiff. Miller, for recorder of mortgages.* By the court:

**ROST, J.** The first question in this case is, whether the probate sale of the separate property of the wife, made for the purpose of paying her debts, and of settling her succession, had the effect of canceling all the mortgages existing in her name, on the property sold. On this question, the present organ of the court differed from his brethren, on a former occasion, and thought the view he took most consonant with principle, if not with authority. As, however, authority has prevailed, and the decision of the court has become a rule of property, he feels bound to consider the question solved in the affirmative.

A town lot, belonging to *Sarah Daly*, and mortgaged by her to *Garner Johnson*, was sold at the probate sale of her succession, and purchased by *Andrew Daly*, through the agency of the curator of the succession, who was the husband of the deceased.

*Andrew Daly* subsequently mortgaged this lot to *Micheaud*, to secure the payment of a note given for a loan of money, and *Micheaud* transferred the note and mortgage to *Aicard*, the plaintiff.

*Aicard* caused the lot to be sold under that mortgage, and *Gardner Johnson* became the purchaser, at the price of \$1,000, \$500 of which he paid, and the other \$500 he retained, to pay the mortgage he claims on the property, with interest.

*Aicard* took a rule upon him, to show cause why this mortgage should not be canceled, and erased from the records of the mortgage office, and why he should not be compelled to pay into the hands of the sheriff, the sum of \$500; the district court made the rule absolute, and *Johnson* has appealed.

If the probate sale was legal, the mortgage in favor of the appellant, must be considered as having been canceled by it, and there is an end of the case; but, it is urged that the sale was not legal, on account of the omission, by the curator, of material formalities, and also because he acted, at the sale, as agent of *Daly*, the purchaser.

Without noticing, in detail, the informalities alleged, which, under the settled jurisprudence of this court, do not appear to us material, it is a sufficient answer to that part of the defence, that *Johnson* is the *ayant-cause* of *Daly*, and holds under him: that, instead of offering to return the property, the defence he makes is in affirmation of the probate sale, and that he cannot be permitted to avail himself of it, so far as it gives him a title, and to repudiate it when he cancels his mortgage.

The curator, being the husband of the deceased, had authority to purchase, even for himself, at the probate sale. Acts of 1840, p. 123.

The evidence of *Daly*, offered by the defendant, to prove that he, *Daly*, assumed the payment of *Johnson's* mortgage, and that he notified *Micheaud* of this assumption, was properly excluded. *Daly* is bound by his assumption, but *Aicard* has nothing to do with this personal obligation, and it cannot be seriously urged, that a mortgage binding upon the plaintiff, could be thus credited.

Judgment affirmed, with costs.

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### GEORGE C. MCCHESENEY et al. v. ANDREW DALY.

**A**PPEAL from the Third District Court of New Orleans, *Kennedy J.*  
By the court:

ROST, J. This case is, in all respects, similar to that of *Aicard* against the same defendant; just determined; and, for the reasons therein given, the judgment is affirmed, with costs.

### FOSTER & Co. v. BAER & Co. et al.

Where an article is unsound at the date of the sale, the standard of responsibility of a *bona fide* seller, is the difference of value at the date of the sale between a sound and the unsound article.

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| Case 2 |     |
| 114    | 603 |

**A**PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J.*  
*M. M. Cohen*, for plaintiffs. *Hoffman and Ogden, Reynolds and Livingston*, for defendants. By the court:

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SLIDELL, J. Upon the question of the right of *Martin, Owen & Co.* to file an answer, we are unable to distinguish this case from *Moran v. Tanner*, 6 Ann. 119.

If the pork was unsound at the date of the sale by *Martin, Owen & Co.* to *Baer & Co.*, the standard of responsibility of the former to the latter is the difference of value, at the date of the sale, between a sound and the unsound article. If, for example, the difference of value on the day of sale was 20 per cent, *Baer & Co.* would be entitled to a deduction of twenty per cent from the price they paid, assuming the price was the fair market value, at the time, of a sound article. In saying this is the standard, we assume that *Martin, Owen & Co.* sold in good faith. Bad faith might involve a larger responsibility; but this is not imputed, and its consequences need not be considered.

The date of the sale being the time to which we are to look, we are unable to ascertain the damages in the present case, as between *Baer & Co.* and *Martin, Owen & Co.* within the market rates at the date, nor the price paid being proved.

It is therefore decreed, that the judgment of the district court against *Martin, Owen & Co.*, be reversed, and that the cause be remanded for further proceedings, the appellees to pay the costs of the appeal.

**JOHN KELLY v. THOS. COOK,—On a Rule taken by McGUIGAN.**

Article 684 of the Code of Practice, which prohibits a sale of property under execution, if the price offered does not exceed the amount of the privileges and mortgages with which it is encumbered; and the article that authorizes the sheriff to raise the mortgage, the inscription of which is subsequent in date to that of the mortgage under which the sale is made, have exclusive reference to conventional mortgages.

**A**PPEAL from the Second District Court of New Orleans, *Lea, J. T. W. Collins, for McGuigan. Bright, for Mrs. Cook. W. W. King, for Recorder of Mortgages.* By the court:

ROST, J. This case is not distinguishable from that of *Young v. Municipality No. One*, under the authority of which the district judge has decided it. The principle settled in that case is, that article 684 of the Code of Practice, which prohibits a sale of property under execution if the price offered does not exceed the amount of the privileges and mortgages with which it is encumbered, and the article which authorizes the sheriff to raise the mortgages, the inscription of which is subsequent in date to that of the mortgage under which the sale is made, have exclusive reference to conventional mortgages, and that no power is conferred upon either the sheriff or the judiciary to order judicial mortgages to be erased from the books of the recorder. This decision was made without reference to the date of the inscription of the judicial mortgages, and it is evident that no distinction can be made under the law.

The mortgage of which the appellant in this case claims the release, is a judicial mortgage, resulting from the inscription of a judgment of separation of property, obtained by the wife of the judgment debtor against her husband; and neither the sheriff nor the district court were authorized to erase it. Whether this mortgage affects the property after the sale, is a question not before us under the issue.

Judgment affirmed, with costs.

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**JAMES McCANDLISH v. KIRKLAND et al.**

If the vendor retain possession of the thing sold, it is liable to seizure for his debts.

**A**PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Marr and Roberts, for plaintiff. Elmore and King, for defendants.*

By the court:

DUNBAR, J. *J. B. Kirkland*, the real defendant in this case, having a judgment against *J. F. A. Boyle*, took out an execution against him, and caused it to be levied on certain furniture found in a house rented and occupied by *Boyle*.

*James McCandlish*, the plaintiff in the present suit, enjoined the execution, claiming to be the owner of the furniture, under a sale from *Boyle*.

The defendant, in his answer, denies that the plaintiff is the owner of the property seized, and says that the sale to *McCandlish* was fraudulent and simulated.

We have carefully examined the evidence, and have come to the conclusion of the district judge, that, after the sale to *McCandlish*, the property sold remained in the possession of the vendor, and was, therefore, liable to seizure by his creditors. *Jordan v. Lewis et al.*, 1 Ann. 59.

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The proof that the plaintiff produced of his good faith, and the reality of the sale, did not satisfy the district judge, nor can we say that it is satisfactory to us.

It is therefore ordered and decreed, that the judgment of the district court be affirmed, with costs.

### NEW ORLEANS CANAL AND BANKING CO. v. A. SCHRADER & Co.

The act of 15th of March, 1847, which declares, that no citizen of another State shall hereafter be arrested in this State, at the suit of a resident or non-resident creditor, except in cases where it shall be made to appear, by the oath of the creditor, that the debtor has absconded from his residence, applies to the citizens of the States of this Union only—not to the citizens of foreign States, or countries.

**A**PPPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. E. A. Bradford*, for plaintiff. *H. Gaither*, for defendant.

By the court:

DUNBAR, J. This is an appeal from a judgment, dismissing a rule to set aside an arrest.

The defendant contends, that the arrest should have been set aside upon the ground that it is not alleged in the affidavit for arrest, that he had absconded from his residence. That this is required by the Act of the Legislature of Louisiana, approved the 28th March, 1840, entitled an act to abolish imprisonment for debt, the 9th section of which, as amended by the act approved the 18th March, 1847, reads as follows: "That no citizen of another State shall hereafter be arrested in this State, at the suit of a resident or non-resident creditor, except in cases where it shall be made to appear, by the oath of the creditor, that the debtor has absconded from his residence."

The affidavit states that the defendant, *A. Schrader*, resides out of the State of Louisiana, at Havre, in France, and the evidence shows him to be a native of Hamburg.

In determining the meaning to be given to the words, "citizen of another State," in these acts of our Legislature, we must be governed by the well established principle of law, which has been embodied in the 14th article of our Civil Code: "That the words of a law are generally to be understood in their most known and usual signification, without attending so much to the niceties of grammar rules, as to the general and popular use of the words." There can be no doubt, we apprehend, that in their most known and usual signification, the words 'citizen of another State,' mean, or convey to our minds the idea of a citizen of another State of this Union, and, we think, if the Legislature had intended to include in this provision of the act of 1840, the subjects or citizens of a foreign prince or government, it would have said so in plain and positive terms.

There is also another rule for the construction of statutes, in the Civil Code, opposite to the present case. Art. 18 declares, that "The most universal and effectual way of discovering the true meaning of a law, when its expressions are

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dubious, is by considering the reason and spirit of it, or the cause which induced the Legislature to enact it." From the great monetary crisis of 1837, and the pecuniary embarrassments of all the citizens and States of this Union that ensued up to the 28th March, 1840, the date of the passage of the act under consideration, it is a matter of history well known to all, that very numerous arrests for debt were made in this State, and particularly in New Orleans, of the citizens of our sister States, who were found transiently in this city, either for business or pleasure, and to such an extent had this been carried, that it was found to interfere materially with the trade and commerce of the city and State. It was to remedy this evil, that, we believe, the law was enacted, without reference to the citizens or subjects of a foreign country, State, or kingdom.

It is true, that imprisonment for debt is a relic of barbarism, which is fast disappearing in the progress of civilization, but the total abolition of it in Louisiana depends not upon the courts, but upon the wisdom and humanity of the legislative branch of our government. We, therefore, have to decide, that it was not necessary in this case for the plaintiff to make oath, that the defendant had absconded from his residence.

Upon the second ground of defence, that the defendant was not about to depart permanently from the State, without leaving in it sufficient property to satisfy plaintiff's demand, after a careful perusal of the evidence, we cannot say that the district judge erred.

It is therefore ordered, adjudged and decreed, that the judgement of the district court be affirmed, with costs, &c.

### ROUSSEAU, Syndic of L. BAUREGARD, v. LOUIS LOVERING.

A surety is not a competent witness for his principal.

**A**PPEAL from the District Court of the Parish of Jefferson. *J. S. Whitaker* for plaintiff, *J. J. Michel*, for defendant. By the court:

*EVERIS, C. J.* The only question in this case is presented by a bill of exceptions. The action is on a note drawn by *Lewis Lovering*, in favor of *John Hein* or bearer.

*Hein's* endorsement is on the note. By this endorsement he became the endorser or surety of *Lovering*. *Hein* was offered as witness to prove facts which would have been a good defence to this action, but his testimony was objected to, on the ground of interest in the event of the suit. And the district judge sustained the objection, and refused to admit his testimony.

It is clear that that the judge did not err in his ruling on this point. *Hein* was directly interested in having the debt for which he was surety, extinguished. A surety is not a competent witness for his principal.

The judgment of the district court is therefore affirmed, with costs.

## SUCCESSION OF ISAAC PIPKIN—T. J. PIPKIN, Executor—On an opposition, M. E. MURE et al.

An executor who hired out the slaves of the succession, and, as an overseer, superintended the labor of others, is entitled to compensation for the services thus rendered, over and above the two and one-half per cent commission which the law allows.

An error in an inventory of the effects of a succession, may be corrected.

Where the testator directs, by his will, that slaves be set free, it is the duty of the executor to take care of, treat and support them, until set free, in the same manner that they were treated by the testator.

**A** PPEAL from the Second District Court of New Orleans, *Lea, J. W. H. Parton*, for the executor. *Stockton and Steele*, for opponents. By the court :

DUNBAR, J. This is a controversy between the heirs and legatees of *Isaac Pipkin*, deceased, and his executor, *T. J. Pipkin*, as to the settlement of his accounts in his capacity of executor.

The testator, *Isaac Pipkin*, who was the owner of a number of slaves, valued, after his death, in the inventory of his estate, at near thirty thousand dollars, died in New Orleans, in the year 1850, having made two wills or testaments, in which he gives and bequeathes to his wife and daughter, the opponents and appellants in this case, all the estate, with the exception of a female slave named *Julia Ann*, and her child, *Florence*, of whom he says: "It is my will and desire, that my slave *Julia Ann Crenshaw*, and her child, *Florence*, have their freedom, and I hereby set them free from and after my death. I beg my wife and daughter, *Mary Eleanor*, to offer no impediment to their being set free; and I beseech my wife and daughter aforesaid, to let them have their liberty, free from bondage, and grant this, my last will and request." He directs, that his slaves shall be hired out for two years after his death, at which time he gives and bequeathes them as before mentioned, and appoints *T. J. Pipkin* one of his executors, who, after having had the will aforesaid duly probated, qualified as such, and acted in that capacity until he rendered up and delivered to the legatees all the property belonging to the estate of the testator, sometime during the present year.

It appears that the deceased, for a number of years previous to his death, lived in New Orleans, and his wife and daughter, in Virginia; that his business and occupation, whilst here, was the hiring of his slaves as laborers, on the levee, in loading and discharging vessels and steamboats; and that *Thos. J. Pipkin* was employed by him for several years in the management of these slaves, in conjunction with two and, at times, three other persons, to superintend the work of some seventeen slaves or hands on the levee. It seems, that the testator, finding this a profitable business, wished it to be continued by his executor for two years after his death. In obedience to this request of the testator, his executor, who had thus been employed in the lifetime of the testator, who had resided in the same house and yard with him and his slaves, and was, moreover, his nephew, continued to live with, manage, hire out, and take care of, all the slaves, as he had done during the lifetime of the testator, under his own eye and direction.

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The accounts of the executor, growing out of the superintendence, care and management of these slaves, are the subject of the present controversy. Three different accounts, which the parties have agreed to consider as one, have been filed by the executor in the district court, to which the legatees made various oppositions, no less than eight of which have been partially sustained by the district judge. The legatees, not satisfied with the amendments ordered by that court, in the accounts of the executor, have taken an appeal; and the appellee, likewise dissatisfied with the judgment, prays that it may be amended in various particulars, as set forth in his answer to the appeal.

The principal item of difference between the parties is the claim, made by the executor, of two thousand six hundred and thirty-five dollars, for his services as an overseer, and the services of an assistant overseer, for a period of twenty-three months, or an average of nearly \$115 per month for the wages of both. The court *a quo* allowed only \$2300, or \$100 per month, and the opponents contend that nothing should have been allowed for the executor's services as overseer, beyond his commission of two and one-half per cent on the amount of the inventory.

We think that the executor should have been allowed the whole amount charged for his own and assistant overseer's services, as being very moderate and reasonable, which is satisfactorily shown by the evidence. Amongst the slaves of this succession were about twenty men, to work by the day, and their wages to be collected daily. It is shown that more than one person was required to superintend and procure work for them. There were also some ten women amongst these slaves, to be hired out; books to be kept; provisions, medicines, and clothing to be purchased, and attention to the slaves when sick, as there were about thirty-nine slaves, of all ages, belonging to the succession. No stronger evidence of the fidelity, energy, and good management of this executor, can be required, than the fact, which is exhibited in his accounts, that, in the period of two years, he received from the hire of these slaves the almost incredible amount of \$16,538 44, of which amount, he transmitted to the heirs and legatees the sum of \$9435.

Nor do we consider that there is any well founded legal objection to the claim of the executor for his wages as an overseer, in addition to his commission of two and one-half per cent on the amount of the inventory. It surely could not have been reasonably expected, if the executor had been a baker or butcher, that he would have furnished bread or meat to these slaves for years without charge, nor can it, with any more reason, be expected that he should have devoted his days and nights as an overseer, to the hiring out of these slaves on the levee, living with them, taking care of them, and managing them, so as to make for the heirs and legatees the enormous profits before mentioned. We do not think that the rule established in the case of *Baldwin's Executor v. Carleton*, 15 L. R. 393, "that a professional man, who is an executor, and renders legal services to the estate he administers, is not entitled to any separate compensation," is applicable to the present case, and would be carrying the doctrine further than we are disposed to carry it.

The district judge, we think, erred in another item, in ordering the "account to be amended by charging the executor with the sum of \$401 70, the difference between the alleged balance of cash on hand and that shown in the inventory."

The testator died on the 20th January, 1850; his wills were probated on the 16th February, 1850, and the inventory was taken on the 26th of March follow-



ing, in which it was stated, that there was \$1000 cash on hand. In the accounts rendered by the executor, he credits the estate regularly, day by day, with sums of money received for the estate, from the 21st of January, 1850, to the close of his administration, amounting to \$17,132 44. It will be found, that up to the 26th March, 1850, the estate is credited with \$1536 90, as so much cash received. The auditor appointed in this cause reports also this fact, and that, up to that date, the executor had paid out \$938 61; showing that, in fact, the executor had really in hand at the time of taking the inventory, a balance of only \$598 29. The amounts making \$938 61, appear, by different vouchers, in the debit side of the account. And this being the true state of facts, as exhibited by the books of the executor, offered in evidence by both parties, it becomes a matter of indifference whether the amount was stated correctly or not at the time of taking the inventory. It is true, the object of the inventory is to ascertain the state of the property at the time of its being taken; but, it cannot be seriously contended, that an error therein cannot be rectified by evidence. It is here shown that there did exist such an error, which, there can be no doubt, arose from the executor having, for more than two months before the taking of the inventory, received and paid out monies for the estate, and his accounts not being then made up, the cash on hand was stated at an approximation. The true cash on hand is now ascertained by evidence, and it has all been credited. Therefore, the judgment of the district court, charging the executor with \$401 70, the difference between the alleged balance of cash on hand and that shown by the inventory, must be corrected. 4 R. R. 278, *Babin v. Noland* and 5 Ann. 550, *Derouin v. Segura*.

We consider that there is error in charging the executor with \$150, the difference between the inventoried price of the horses of the succession, and the amount for which they were sold by the executor. He was directed by the heirs and legatees to sell them at private sale, with as little expense as possible; which he did, and has accounted for the proceeds thereof.

There is also another amendment to the account of the executor, ordered by the district judge, which should be corrected. He charges the executor with \$305, for the board, lodging and clothing of the emancipated slave, *Julia Ann*, and her daughter, *Florence*.

It is shown that the executor permitted them to remain in the house of the deceased, with the other slaves, where the executor himself resided, and that he supported and took care of them, in the same manner that they had been treated by the testator in his lifetime. This could have added but little to the expense of the whole establishment, (consisting of about thirty-nine slaves,) and we think that, until their emancipation could be effected, it was the duty of the executor to retain them in his possession and treat or manage them in the same manner in which they had been treated by their deceased master. We are of the opinion, that this was required of the executor, both by duty and the ordinary dictates of humanity; and it is by no means to the credit of the heirs and legatees, that they should complain of it.

The account of the executor, amended in conformity to this opinion, as hereinbefore stated, will exhibit a final balance of \$3968 53 in his favor. The district judge has allowed to the executor, by his judgment, \$1191 70 less than this amount, but has failed to give him a judgment against the heirs and legatees for the amount due to him from them.

It is therefore ordered, that the judgement of the district court be reversed; that the account of the executor, amended in conformity to this opinion, be con-

**SUCCESSION OF FIFTH.** affirmed and homologated, and that he recover of the aforesaid heirs and legatees, the sum of \$3968 53, with interest at five per cent per annum from the 8th of May, 1852, until paid, and the costs in both courts to be paid by the heirs and legatees.

### H. E. BURTON v. JAMES BREWER, Sheriff, et als.

The transferee is only possessed, as regards third persons, after notice has been given to the debtor of the transfer having taken place. C. C. art. 2613. And an execution may be properly levied by creditors, previous to such notice.

In an affidavit for a new trial, on the ground of newly discovered evidence, the plaintiff swore that he expected to prove notice of the transfer of certain property. The affidavit was held to be defective, because it did not state the time at which the notice of the transfer was given.

**A** PPEAL from the Third District Court of the Parish of Jefferson, *Clarke, J. V. F. and J. B. Cotton and J. J. Michel*, for plaintiff. *H. H. Strawbridge*, for defendants. By the court :

**DUNBAR, J.** The executors of the succession of *Samuel Shakespeare*, having an execution in their name against *W. P. Kelsy*, had it levied by *James Brewer*, Sheriff of the Parish of Jefferson, upon a claim which *Kelsy* had against the city of Lafayette, for building a market-house.

The plaintiff in this suit, claiming to be the owner of the seized property under a sale, or transfer, by private act from *Kelsy*, sued out an injunction to prevent the sale. The district judge dissolved the injunction, and gave judgment against the plaintiff, with twenty per cent damages on the amount of the judgment enjoined, and he has appealed.

The only question on the trial, was, whether the city of Lafayette, the debtor of *Kelsy*, had had notice of the transfer to the plaintiff, *Burton*, previous to the seizure. The transferee is only possessed, as it regards third persons after notice has been given to the debtor of the transfer having taken place. C. C. art. 2613. And an execution may be properly levied by creditors, previous to such notice. 6 Martin, N. S. 329. 2 L. R. 424. 1 R. R. 26 11 R. R. 298. The district judge, we infer, considered that such notice was not proved: and we think he did not err.

The plaintiff moved for a new trial, upon various grounds; the only one, however, which we consider it necessary to take any notice of, was that of newly discovered evidence, by which, the plaintiff swears, he expects to prove notice of the transfer, but leaves out the indispensable allegation of the time at which this notice was given that he expects to prove by this newly found testimony. If it was a notice after the seizure, it would have been of no service: if before, he should have so stated it in his affidavit.

The district judge overruled the motion, very properly, for a new trial; but we do not concur with him in the reasons he gave for so doing.

The defendant has asked for an amendment of the judgment, so as to include *B. Dougart*, the surety, on the injunction bond. We think he is entitled to this, but not to the damages he claims for a frivolous appeal.

It is therefore ordered, that the judgment of the district court be so amended as to give the defendant a judgment, *in solido*, for his twenty per cent damages

and costs against the plaintiff, in injunction, and his surety, *B. Dougart*, and that, in all other respect it be affirmed, with costs.

Plaintiff's counsel applied for a re-hearing, and cited 9 R. R. 207. C.C. 3522. 9 R. R. 270. 11 M. R. 702. C. C. 2613. 1 N. S. 425. 6 N. S. 286. 17 L. R. 471. 8 R. R. 259. 12 R. R. 409. 4 Ann. 207. Story, on Agency, 140.

Re-hearing refused.

BURTON  
v.  
BREWER.

### RICHARD SUYDAM v. HENRY L. KINNEY.

Plaintiff has the right to offer evidence to rebut the plea of prescription, and when the plea is filed in the Supreme Court, the cause will be remanded for a new trial.

Plaintiff, who sues as liquidator on a contract made with a firm, must prove his authority to sue as liquidator, although it be not specially denied.

**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan*, J. *John Livingston*, for plaintiff. *Grymes and Reid*, for defendant.

By the court:

SLIDELL, J. A plea of prescription having been filed in this court, and the plaintiff having the right to offer evidence to rebut it, the cause will be remanded for a new trial. C. P. 902.

It is proper to add, that the evidence before us does not establish the plaintiff's right to maintain this action. The note upon which the suit is brought, is payable to the order of *Suydam, Jackson & Co.*, and *Suydam* claims as liquidator of that firm. This capacity is one arising out of contract; and, under the rule laid down in *McDonald v. Millaudon*, a special denial was not necessary, to put the plaintiff upon proof of his authority to sue as liquidator. 5 L. R. 405.

It is therefore decreed that the judgment be reversed, and that this cause be remanded for a new trial, the plaintiff to pay the costs of the appeal.

### HILL, MCLEAN & Co. v. JOHN A. MILLER.

Where the proceedings in a case had been conducted irregularly, for more than a month, at such times as suited the convenience of the parties and the leisure of the court, the circumstance that the court received the testimony of witnesses, after the plaintiffs' counsel had concluded his argument, is not, where the plaintiff sustains no injury, a good ground of exception.

**A** surety, in exercising his right to point out for discussion, the property of the principal debtor, is not restricted to property within the jurisdiction of the court that rendered the judgment. He may point out any property having the requisite conditions, within the limit of the State.

**A** creditor ought not to be subjected to a troublesome, difficult, and protracted discussion of the property of the principal. The law supposes, that the property designated is in a condition to be made available to the creditor, for the payment of his debt.

**A** surety who requires the creditor to discuss property, must describe it so particularly as to enable the creditor fully to understand its situation, extent, title, and condition.

The plea of discussion can be made but once.

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HILL  
v.  
MILLER.

**A** PPEAL from the Third District Court of New Orleans, *Kennedy J. T. J. Semmes*, for plaintiffs. *Ogden and Duncan*, for defendant. By the court :

**EUSTIS, C. J.** This is an appeal from a decision of the judge of the Third District Court, taken by the plaintiffs. The court sustained a plea of discussion, made by the defendant, who was sued on a written obligation, as the surety of *Joseph E. Miller* and his wife.

The only question presented by this plea, is, whether the defendant has complied with the requisites of the code in relation to this plea.

There is a bill of exceptions taken by the plaintiffs, to the reception of certain evidence, after the evidence at the trial was closed. The district judge received the testimony of the witnesses, after the argument had been concluded by the plaintiffs' counsel, and the case by him submitted, and the defendant's counsel had commenced his argument. The proceedings, it appears, were conducted from day to day, at intervals, from the 12th of March to the 16th of April, undoubtedly at such times as suited the convenience of the parties and the leisure of the court. We, therefore, think the subject of the complaint, in the bill of exceptions, was a matter resting in the discretion of the court. We know of no instance of a reversal of a judgment for a cause of this kind. It is not pretended that an opportunity was not afforded to the plaintiffs to countervail the evidence thus offered, or that any injury has been worked to the true merits of the case, by the action of the court below.

The article 3016 of the code, provides that the surety who exacts the discussion, is bound to point out to the creditor the property of the principal debtor, and furnish a sufficient sum to have the discussion carried into effect. The property pointed out must not be out of the State, in litigation, nor even if mortgaged for the payment of the debt, that which is not in the possession of the debtor.

The defendant, in his plea of discussion, points out to the creditors a cotton plantation, and slaves, in the parish of Concordia, the place in which the obligation sued on is dated, and it being the domicile of the debtors, the place in which the debt is consequently payable. The property is alleged to be in the debtor's possession, free from encumbrance, and not in litigation. The plantation is described as situate in the parish of Concordia, on the south bank of Black river, being a tract of about one thousand acres of good cotton land, seven hundred of which are in cultivation, with a dwelling house, and all necessary buildings and appurtenances, with twenty-five efficient working hands, and some thirty-five or forty negroes, on said plantation.

The defendant also offered to advance a sufficient sum to defray the expenses of the discussion, and the sum of \$250, which was tendered accordingly.

The defendants contend that the plea of discussion thus made, ought to have been overruled, because the designation of the property is not such as is required by law.

The cases which have arisen, in which this subject has been noticed, do not afford us any rule for our guidance, nor are we aware of what has been the practice in relation to it.

As has been observed by counsel, there are no precedents or rules in the French works relating to this subject. The condition of the law of France explains this.

The article of the Napoleon Code 2023, which corresponds with our article 3016, provides, that the surety has no right to exact from the creditor the dis-

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MILLER.

cussion of the principal debtor's property, situated out of the jurisdiction of the court.

The former jurisprudence of France, recognized the rule as a principle, deducible from the nature of the contract.

When this article of the Napoleon Code was under consideration in the council of state, Cambecères, consul, asked the reason for it, and why a surety should not be permitted to offer, for the payment of the debt, property of the debtor within the jurisdiction of other courts.

Bigot Préaménue answered, that it had always been held, that the creditor was not bound to discuss property situated at so great a distance; that the discussion would be attended with too much embarrassment and expense.

Where the discussion is confined to property within the jurisdiction of the court, the surety being always required to advance the money necessary for the expenses of the proceedings, few cases necessarily arise in which the condition of the property cannot be ascertained immediately, and without trouble; and the rights of creditors are, by these means, not liable to vexatious delays.

Our code requires that the surety should not point out property situated out of the State; and it is inferred, that there is no restriction on his right to designate any property having the requisite conditions, within the State, throughout its whole extent, and without reference to the jurisdiction of the court in which the proceedings are had.

Conceding this right, we must regulate its exercise according to the principles of the contract, and not permit its very object and purpose to be defeated.

It is an elementary principle of the contract of suretyship, that the creditor ought not to be subjected to a troublesome, difficult, and protracted discussion. Pothier, on Obligations, 409, 407.

The law supposes that the property designated is in a condition to be made available to the creditor for the payment of his debt: C. C. 3014; and the discussion is a mere question of order, or the mode in which he is to be paid. *Beneficium ordinis sive excussionis*. Institutes of the Civil Law of Spain, book 2, tit. 18.

If we carry into effect this contract according to its principles, and any thing short of this would be to render it illusory, it seems plain, that the property which the defendant required should be subjected to the plaintiffs' debt, has not been properly described.

Of the slaves, the description is totally deficient; and, admitting the plantation to have been well known, and the possession of the defendant, public and notorious, we cannot hold the description in the plea, to have been sufficient to maintain the right of discussion, claimed by the defendant.

There is no designation of the metes and bounds of the plantation, nor any note of the title, nor of the incumbrances on it.

We are not called upon to determine what would be, in every case, a compliance with the requisites of the code, on this subject; but we state some of the obvious difficulties in rendering property available to a creditor, when situated in a remote parish.

It is well known that plantations, except in old settled parts of the State, are made up of small tracts; and all lands held under the United States, are described by the mathematical divisions established by the land laws. These titles are not recorded in the ordinary recording offices of the State, but in the land offices.

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MILLER.

We have not only our own courts, but courts of the United States, in which land suits are instituted. How can it be ascertained that a given quantity, a quarter section of land, in a large tract, is, or not, in litigation, unless a description of it be had? It may be ascertained by those familiar with the facts; but, in a majority of cases, the inquiry would be full of embarrassment.

The more the subject is considered, the more apparent will be the necessity of requiring from the surety, such a description of the property which he requires the creditor to discuss, as will enable him fully to understand its situation, extent, title, and condition, as available to him for the payment of his debt. We think, in these respects, the description of the property given by the defendant, is insufficient, and not in compliance with the requisitions of the code.

The plea of discussion can be made but once.

The plaintiffs are therefore entitled to judgment; but, as the case stands, it cannot be rendered in this court.

The judgment of the district court is therefore reversed, and the case remanded for further proceedings; the appellee paying the costs of this appeal.

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#### ALEXANDER LESSEPS v. HIS CREDITORS.

In a contest for the appointment of syndic, the judgment of the court, rejecting the propositions of an applicant, is appealable.

A person who holds the notes of an insolvent is not entitled to vote for a syndic, where it appears, that, on a settlement of accounts, there would be a balance in favor of the insolvent.

The wife, in partnership of goods with her husband or her heirs, should not be allowed to vote, in the deliberations of the creditors of the husband, for syndic, unless her rights have been previously settled by a deed of partition, or judgment for separation of goods. An agent, with authority to collect or renew a draft, on which an insolvent is bound, and who has a general authority to "do what he thinks best under the circumstances," is authorized to vote for a syndic.

Where creditors, lawfully entitled to vote, have had an opportunity to vote, a new election cannot be ordered for the purpose of letting in new voters, whose lawful claim to vote has been subsequently acquired.

**A**PPEAL from the Fourth District Court of New Orleans. *Strawbridge*. J. G. Le Gardeur and A. K. Josephs, for *Edward Shift*. *Benjamin* and *Micou*, for *L. Millaudon*. By the court:

**SLIDELL, J.** *Alexander Lesseps* instituted proceedings to obtain a respite. A meeting of creditors was ordered. They met, refused a respite, and voted for a syndic. On the 6th February, 1852, the meeting, which was kept open during several days, was closed by the notary, who stated the result to be, that the respite prayed for had been refused; that nineteen creditors, representing the sums of \$81,727 84, had voted for *Edward Shift*; that twenty-three creditors, representing the sum of \$129,593 42, had voted for *Laurent Millaudon*; and that he was consequently duly elected syndic. Immediately upon the return of the proceedings before the notary being made to the court, *Shift* filed an opposition, in which he alleged that *Millaudon's* apparent majority was created by illegal votes, to the amount of \$69,300, against which he protested before the notary. The grounds of opposition were as follows:

1. The vote of *Wilhelmus Bogart*, upon two notes belonging to *Wm. W. Pugh*, a creditor of insolvent, on the ground of the total want of authority of said *Bogart* to vote on said claim, and of the insufficiency of the oath by him taken; which notes are for the sum of \$3,500 each, amounting together to the sum of \$7,000. LESSER'S  
CREDITORS

2. And he further opposes the vote of *H. C. Story*, on behalf of his wife, *Mrs. Story*; said vote being upon her hereditary share of the community of acquets and gains which existed between said insolvent and his late wife, the mother of said creditor, said community never having been settled, nor the rights of the heirs ascertained by a deed of partition or a judgment of court; said claim being for \$12,000.

3. And he further opposes the vote of *Auguste Lesseps*, son of the said insolvent, the same being based upon his hereditary rights in the community of acquets and gains which existed between said insolvent and his wife, the mother of said creditor, the same never having been liquidated by judgment or partition, and for the reasons cited in No. two; and also because the said *Auguste Lesseps*, even had the community been settled, is not a creditor of the insolvent; said claim being for \$11,500.

4. And he further opposes the vote of the said *Alexander Lesseps*, as tutor of the minors, *Eugène Lesseps*, *Hersilie Lesseps* and *Angéla Lesseps*, on the ground: 1. That the same is founded upon their hereditary rights and share in the community of acquets and gains which existed between their mother and her husband, the said insolvent, and which have never been, as stated above, settled by partition or judgment, or in any legal manner. 2. That the said *Alexander Lesseps* could not appear and take any part in the deliberations of his creditors. 3. Nor was he qualified or competent to represent the interests of said minors.

5. That he opposes the vote of *Laurent Millaudon* upon a certain note of the insolvent, upon which he was endorser, on the ground that, on the 3d of February, the *bond fide* holder of the note, *D. Kennedy, Jr.*, had voted upon said debt, as will appear by said proceedings; said note being for \$2,800.

His prayer was, that the alleged illegal votes for *Millaudon* be rejected, and he, *Shiff*, declared the duly elected syndic, and authorized to administer the estate. *Millaudon*, and *Lesseps* in his capacity of tutor, filed an answer to this opposition, in which, after denying the alleged illegality of the votes for *Millaudon*, they pleaded that the vote of *Trotter* for *Shiff* was illegal, because he was not, at the time of voting, the owner of the notes described in his vote, nor authorized to vote upon them. Wherefore, they prayed that the vote of *Trotter* be rejected. They alleged that one *Soubie* was a creditor of the insolvent, in the sum of \$40,000; that he attended the meeting for the purpose of voting for *Millaudon* as syndic, but he was informed by the notary that he was not authorized, in consequence of which declaration, *Soubie* retired without voting; that he was entitled to vote, and should have been permitted to do so. They further alleged, that at the time of the vote of *Lesseps*, as tutor, the proceedings of a family meeting advising the adjudication of the property of the minors, had been handed to the clerk of the Second District Court, with a petition praying for their homologation and the adjudication to him accordingly; but the same had not been presented to the judge. That the said proceedings have been since homologated, and the property adjudicated accordingly. Wherefore they prayed, that the opposition of *Shiff* be dismissed; but that, if the same should be sustained by rejecting the votes given in favor of *Millaudon*, then that a new meeting of the creditors be held for a choice of syndics.

**LESSEPS**            Upon these pleadings, a trial being had and evidence heard, the following  
**vs. CREDITORS**    opinion and decree were pronounced by the District Judge.

"Satisfied as I am that this court possesses the power to remand the cause for further deliberation among the creditors, remarking that, under the supposition that the pretensions of the opposing creditors were maintained, the difference in the vote would be so exceedingly close, whilst a large amount of votes were or would be lost by an error not within the control of the children of the insolvent; considering the time of the year which renders it impossible to settle the question of the syndicate (if an appeal is taken) during the present year, I judge it so far for the interest of the creditors, that the proceedings be remanded to the notary for the purpose of convoking a new meeting of the creditors, and reporting the result thereof to the court.

"It is therefore adjudged and decreed, that the proceedings be remanded to the notary, *Theo. Guyol*, for the purpose of convoking a new meeting of the creditors of the insolvent, and that the result thereof be reported to this court."

A motion has been made to dismiss the appeal on two grounds, one of which was afterwards abandoned, and the other is, that the judgment is not appealable, not being final, and working no irreparable injury to the appellant.

The motion, in our opinion, cannot be maintained. The matter in controversy was, who had been elected syndic. *Shiff* asserted that he had been duly elected, by virtue of the proceedings had before the notary. *Millaudon*, on his part, joined issue with *Shiff*, and also asserted that he had been lawfully elected. The court gave a judgment, which finally rejected the claim of *Shiff* to be recognized as syndic under the proceedings of the meeting. The court did not, upon a fair interpretation of the opinion and decree, hold the question of the right of *Shiff*, under the proceedings already had, open for future deliberation. It rejected his pretensions. The decree of rejection is final. If, at the proposed future meeting, he should receive a majority of votes, and thus be elected syndic, (upon which point we are uninformed by the transcript), he would take the office under such new proceedings, not under those already had, which he insisted, and still insists, conferred upon him the right to the office. Was he entitled to be recognized as syndic by virtue of the first meeting, or was he not so entitled? That is the question which the court below decided finally against him, and it is that final decision which he asks this court to review.

The votes given by the *Lesseps* family amount to a total of \$59,500. The counsel for the appellant have, we think, demonstrated conclusively that these votes were illegal; that at the time of voting, whatever may have since occurred, they had no right to vote.

With regard to the vote of *Auguste Lesseps*, to which various objections have been raised, it is sufficient to observe, that although his vote states that he was the holder of notes of his father, the insolvent, to the amount of \$11,500, yet, on the other hand, it appears, that he was a large debtor of his father; so that the balance was against him; and accordingly, at an earlier stage of the meeting of creditors, before it was found that a respite was hopeless, he stated that he was not a creditor of the insolvent.

The balance of the above mentioned amount of \$59,000 is composed of the votes given by *Mrs. Story*, a daughter of the insolvent, and by the insolvent, as tutor of his minor children. These votes must be considered as illegally given, because the community right of their mother has not been previously settled by a deed of partition, or judgment for a separation of property. The 15th section



of the statute of 1817, enacts that, "In all the deliberations which shall take place between the creditors, either for the choice of syndics, or for the sale or disposal of the property surrendered, or for any other object relative to the interest of the mass of creditors, the opinion of the majority of the said creditors, in sum or in claims, shall prevail; but, in the case of an equality in the sum or claims of the contending parties, then the number of persons shall prevail; provided, however, that the wife, in partnership of goods with her husband, or her heirs, shall not be allowed to vote in said deliberations, unless their rights should have been previous settled by a deed of partition, or a judgment for a separation of goods."

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If we give *Millaudon* the benefit of *Bogart's* vote, which is disputed, and of his own vote, also disputed, and deduct the above illegal votes to the amount of \$59,000, he would be left with votes to the amount of \$70,093 42.

The vote for *Shiff* was \$81,727 84. Conceding, for the purposes of argument, that the *Kennedy* vote may be considered as withdrawn from him, he would be left with votes to the amount of \$78,927 84; in other words, a majority of the legal votes given, unless the objection made to *Trotter's* vote for \$10,000 be maintained.

In our opinion, *Trotter's* vote in *Shiff's* favor, must be maintained at least to the amount of \$5,000. He appeared, and voted at the meeting as the attorney of *Tilford*. Was he authorized to do so? It will be observed that his authority, as agent, is disputed, he not being the actual owner of the claims for \$5,000 each, although stated as the holder on the schedule. There is in evidence a letter of his absent principal to *Trotter*, dated 7th January, 1852, in Kentucky, in which he says: "I was a good deal surprised to hear that *Lesseps'* draft was not paid, as I made sure it would be entirely paid. I had made arrangements to invest it; but as the object now is to secure it, you must do what you think best under the circumstances, although I would greatly prefer the money; at all events, if you have to renew, endeavor to get some stronger acceptor who won't let down for so small an amount. I remitted his draft, via Baltimore, for \$5,000, due 15th and 18th instant, which I have advised you in former letters, and which I am extremely anxious to hear of its safe arrival."

*Trotter* was clearly the agent of *Tilford*, with authority to collect the draft, and with power even to renew. As an incident to these powers, and especially in view of the broad expression, "do what you think best under the circumstances," we think *Trotter* was authorized to vote for a syndic of the insolvent's estate, a measure conservative and administrative in its character. It will be observed that he did nothing to impair the rights of his principal, such, for example, as voting for a discharge would have been. He simply attempted to select a depository of the debtor's property, which property was, by force of the judicial proceedings, to go out of the hands of the insolvent into the hands of some one else, as a trustee for his creditors. As to voting against the respite, as he had the power and discretion to renew, he had the power and discretion to refuse a renewal. A respite would substantially have been a renewal.

We conclude, therefore, that *Shiff* had a majority of the votes legally given; that the illegal votes for *Millaudon* must be considered not given, and consequently that *Shiff* had a right to be recognized as syndic to the exclusion of *Millaudon*, unless, under the circumstances of the case, there was a legal discretion vested in the district judge, to disregard the action of a majority of lawful voters, and order a new meeting.

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If there had been any irregularity in the call or mode of conducting the meeting, by which creditors having a lawful right to vote had been prevented from doing so, or it could be supposed that a fair expression of their will had not been obtained, it might then be said that no lawful election had been held, and that a new one should take place. But where creditors, lawfully entitled to vote, have had an opportunity to vote, we do not perceive upon what principle of right a new election can be ordered, for the purpose of letting in new voters, whose lawful claim to vote, if any they have, has been subsequently acquired. If there be any hardship upon the heirs of *Mrs. Lesseps* in entrusting the insolvent estate to a syndic in whose nomination they had no voice, it is the result of their own *laches*, or the *laches* of those who had charge of their affairs; and not the fault of those diligent creditors who attended the meeting, and selected the person in whose integrity and capacity they had confidence, and into whose hands they desired that the assets of the insolvent should immediately go to be administered for their benefit. We question, whether in the case of an election for directors of a corporation, a new election ought to be ordered under a similar state of votes; but the case here is stronger against a new election, because in the former case the business of the corporation would be in the meanwhile under the care of the old board, whereas in the case of an insolvent estate, the creditors have no one to take care of their interests until a syndic is chosen.

The cases cited by the counsel for the appellee in support of the order of a new election, do not appear to us to sustain him. The point ruled in the case of the *Long Island Rail Road Company*, 19 Wendell, 37, was, that where votes rejected by inspectors at the election of directors, if received, would have elected a certain ticket, are adjudged to have been erroneously rejected, the only remedy is to set aside the election, the court not having the power to declare the ticket successful, for which the votes would have been cast, had they been received. It is true, that in that case the court refused to permit the four directors to hold whose names were upon both the contending tickets; but the reason given was that the election was irregular on account of defect of notice. If the whole proceeding, said the court, is to be deemed irregular, it seems necessarily to follow that it must be entirely vacated. The court also there said, that they could not assume the power of pronouncing duly elected, a ticket which confessedly received a minority of votes; but this is very different from saying, that they would not assume the power of declaring a ticket elected which received a majority of legal votes, although that ticket was in a minority, if all the votes legal and illegal, were counted.

The latter power was in fact exercised by the same court, in another case cited by the appellant. See *Ex parte Desdoity*, and others. 1. Wendell, 55.

In *Jordy v. Hebrard*, 17 L. R. 457, it was held that if a candidate who received a sufficient number of votes, being the lowest of the successful candidates, was ineligible, the candidate next highest after him was not entitled to a seat, and a new election must take place as to the vacant seat. The case is not analogous to the present. The votes were given to him by lawful voters, but he was ineligible. The wishes of those voters, who inadvertently voted for him, being a majority, could not justly be disregarded, and a person brought into the board by the will of a minority of the lawful voters. The will of a majority of lawful voters had, through inadvertence, not been efficiently expressed.

In conclusion, we would add, that it is important that the administration of insolvent estates should not be protracted; and, to this end, it is particularly desirable that they should be speedily withdrawn from the possession of the bankrupt, and placed in the hands of syndics. It would be a dangerous precedent to subject such estates to the delay of a second election, in order to give time for the qualification of voters, who, at the date of a meeting duly convoked, were not clothed with the necessary legal capacity.

It is therefore decreed, that the judgment of the district court be reversed; and it is further decreed, that the said *Edward Shiff* is the duly elected syndic of the creditors of the said insolvent, *Alexander Lesseps*. It is further decreed, that the cost of this appeal be paid by the insolvent's estate, and that this cause be remanded for further proceedings, and according to law.

Application for re-hearing refused.

### CARMELITE, a Negress, Slave, v. JEAN LACAZE.

A condition in the act of sale of a slave, that the purchaser shall emancipate him after a specified time, is valid, and enures to the benefit of the slave; the right of property is transferred to the purchaser, subject to the slaves status. If, however, the right of emancipation should be defeated or terminate, from any cause independent of the acts of the purchaser, the slave remains his property.

**A**PPPEAL from the Second District Court of New Orleans, *Lea, J. Tissot*, for plaintiff. *Dufour*, for *Lacaze*. *C. Maurian*, for intervenor. By the court:

**EUSTIS, C. J.** This suit was commenced for the purpose of effecting the emancipation of the plaintiff, on the ground of her having been purchased by defendant, on the condition of emancipating her at the expiration of the term of seven years from the date of the sale.

On this issue between the plaintiff and defendant, judgment was rendered dismissing the plaintiff's petition on the evidence exhibited. From this judgment no appeal has been taken.

On this suit was engrafted another, the issues of which had little connection with it, in which *Lacaze* is made defendant, and an intervening party is plaintiff. Judgment was rendered on this intervention, against *Lacaze*, and he has taken this appeal.

The accumulation of suits of this kind, tends to create confusion in practice, and much embarrassment in the administration of justice. It gives rise, frequently, to questions which have no place in jurisprudence, and to the solution of which the ordinary rules of practice can scarcely be applied.

As, however, the parties have litigated their rights, in this form, and all the evidence is before us, we consent to revise the judgment appealed from.

The intervening party, who is the appellee in this court, *Francoise E. Denbrere*, a free woman of color, on the 7th of June, 1844, sold *Carmelite* to *Lacaze* for \$800. *Lacaze* bound himself to emancipate her after seven years service from the date of the sale, and to fulfill all the formalities requisite for her emancipation, and to bear the expense thereof. This was a formal condition of the sale. In the petition of intervention it is charged, that in selling *Carmelite* to the defendant, under this condition of enfranchisement, the petitioner intended to

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reward the faithful services she has received from the slave who had nursed one of her children ; that *Lacaze*, in his answer to the plaintiff's petition, had alleged, that he could not comply with the condition of emancipating her, in consequence of her having been guilty of such offences as prevented him from obtaining it under the laws, which allegation the petition alleges is true. It then prays that, inasmuch as *Lacaze* cannot emancipate the slave, she be restored to the petitioner, and that judgment be rendered against *Lacaze* for her wages. The district judge decreed the delivery of the slave to the intervening petitioner, and allowed her wages from the date of the decree, at \$25 per month.

This judgment is sought to be maintained on the ground, that by selling the slave, on the condition that she should be emancipated after seven years service, at the expense of the purchaser, nothing was sold but the services of the slave for seven years ; and the appellant having had her services for that term, he can have them no longer. Her emancipation having become impossible, she reverts, of right, to her former mistress.

It seems that the misconduct of the slave, which was the obstacle to emancipation, was the necessary result of the vile and profligate employment and associations to which *Lacaze* subjected her, and it is strongly pressed upon us, that we cannot permit a man to falsify his title by his own infamy.

It is matter of regret that we are not permitted to act upon this suggestion, and to visit upon the party the consequences of his iniquity. But the question before us is one exclusively of property, and must be determined according to the rules of law.

A slave may make a contract with his master for his emancipation, and when he attains the age prescribed by law, may have his right under it adjudicated upon, and his emancipation decreed on a compliance with the conditions and formalities prescribed by law. A condition in the sale of a slave, that he shall be emancipated at a future time, has always been held as a stipulation for his benefit, of which he is permitted to take advantage in the same manner as in ordinary cases of stipulations in contracts for the benefit of third persons. Slaves who, by virtue of a contract of their masters with themselves or third persons, have acquired the right of being free at a future time, or on a certain condition or event, attain thereby the *status of statu liberi*. We understand the contract of sale, between these parties, as creating this *status* in the slave, and transferring the right of property in her to the purchaser, subject to the condition of the *status*, and not as a sale of the services of the slave for the term of seven years. If her right of emancipation should be defeated or terminate, from any cause, independent of the acts of the purchaser, she remains absolutely his slave. If he has been guilty of any acts which violate the condition on which the sale was made to him, the remedy, of the party aggrieved, is only to be had on an action for the dissolution of the contract, or of damages for a breach of the contract.

We do not find the case of *Nimmo v. Bonney*, cited by the counsel for the intervening party, applicable to the present case.

Our statement of the remedy of the appellee is to be understood as hypothetical. Either of those mentioned is liable to grave objections, which have their foundation in the contract itself. The case before us does not require them to be noticed, and it is sufficient for us to confine ourselves to the opinion, that the present action cannot be sustained.

The judgment of the district court is therefore reversed ; and judgment rendered for defendant, with costs in both courts, without prejudice.

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### SAME CASE—ON A RE-HEARING.

By the court :

EUSTIS, C. J. It is ordered, adjudged and decreed, that the judgment heretofore rendered by this court, remain undisturbed.

### PEARL RIVER NAVIGATION COMPANY v. STEPHEN A. DOUGLASS.

At the time of the shipment of a planter's crop of cotton, the overseer was told by the master of the steamer on which it was shipped, that the stage of the water did not justify his taking the whole crop. In consequence of the stage of navigation, some of the bales were afterwards put on shore, the steamer retaining as many as she could carry out of the river. The evidence did not show that those which were left could, by any other conveyance, have been taken to market sooner. *Held*: That the steamboat was not liable for damages.

**A** PPEAL from the Second District Court of New Orleans, *Lea, J. F. W. Haralson*, for plaintiff. *H. B. Eggleston*, for defendant. By the court :

SLIDELL, J. The defendant being sued for the freight of cotton brought by the steamer of the plaintiffs', from a place on Pearl river to New Orleans, reconvened for damages for the injury done to sixty-four bales, part of the shipment, from having been thrown out on the bank of the Pearl river, where it was exposed and injured. He also claimed the alleged difference in price, owing to the delay in the delivery of the portion of the cotton so put ashore, and which the steamer brought at her next trip. There was a serious decline in cotton between the time when a portion of the shipment reached New Orleans, and the arrival of that portion so put ashore.

We do not think it necessary to determine the question, whether the carrier is liable for the fluctuation of the market, where a delay has occurred, through his own manifest fault. The reasons given by the district judge, on refusing an application for a new trial, made by the defendant, are sufficient for the decision of the present case.

"It is manifest," he observes, "That the reason the cotton was placed upon the river bank, was in consequence of the low stage of water, a fact which was as well known to the defendant's agent as to the master of the steamer. It appears from the evidence, that the master of the steamer told the overseer, of the defendant, that the stage of water did not justify the taking of the whole of the cotton. I am not satisfied, from the evidence, that defendant's cotton did not get to the New Orleans market as soon as it could possibly have been conveyed there at that season, and at that stage of the river. If this be true, and certainly the contrary is not shown, the defendant suffered no damage. The steamer took all she could carry out of the river on the first trip, and it is not shown that the remainder could, by any other conveyance, have been taken to the city any sooner."

Judgment affirmed; costs of appeal to be paid by appellant.

## H. CARRELL v. MUNICIPALITY No. Two.

The facts show that the defendants are not spoliators. *Held*: That no vindictive or consequential damages can be recovered against them.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Emerson and Whitaker*, for plaintiff. *Randell Hunt*, for defendants. By the court:

ROST, J. The Municipality No. Two purchased the barge, which has given rise to this litigation, in good faith, from the agent of the plaintiff, who delivered it to them. The price was not paid at the time of the delivery; and, when, some three weeks after, the plaintiff denied the authority of his agent to sell, an offer was made to him to return the barge and to pay him \$500. This proposal was at first accepted by the plaintiff, although it was not carried into effect. The district judge came to the conclusion, under the evidence, which is conflicting, that the price of \$1000, which the defendants had agreed to pay, was the full value of the barge, and that the damages sustained by the plaintiff were equal to one-half of that value. This being the precise sum originally offered him.

The plaintiff assigns as error, that he should have been allowed full compensation for the use of the barge, and the probable profits he would have made by using it in the transportation of freight and merchandise, during the time it remained in the possession of the defendants.

The defendants are not spoliators, and no vindictive or consequential damages can be recovered against them.

The plaintiff claims \$350 only for the damage done to the barge, while in the possession of the defendants, and for the cost of repairs. So that the judgment allows at least \$150 for the use of it. That amount appears, to us, reasonable.

It is unnecessary to notice the claim for damages in consequence of demurrage, for which the plaintiff says he has become liable to the ship *Arthur*, in consequence of the detention of the barge by the plaintiff. There is no evidence in support of it.

It is ordered, that the judgment in this case be affirmed; the plaintiff and appellant to pay costs of this appeal.

## TOWNSEND and MILLIKEN v. C. H. MILLER.

The law gives to every creditor, where there is no cession of property, and to the representatives of creditors, where there is a cession or other proceedings in which they are collectively represented, an action to annul any contract in fraud of their rights.

Where a creditor, on his own responsibility, and at his own cost, prosecutes an action to avoid a fraudulent sale made by an insolvent, the benefit resulting from the action cannot be claimed by the syndic who is no party to it. It enures entirely to the creditor, by whose vigilance it was obtained.

**A** PPEAL from the District Court of the Parish of Jefferson, *Clarke, J. Durant and Horner, for Charles Fonda, syndic of Miller. Hunton and Bradford, for plaintiffs.* By the court:

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**EUSTIS, C. J.** The plaintiffs having obtained judgment against *Charles H. Miller*, also had judgment against his wife, by which a certain fraudulent judgment, which she had obtained against her husband, was reduced, and the amount of the excess over that of her legal rights was decreed to be paid to the plaintiffs, in part satisfaction of their judgment against the husband.

The plaintiffs took out execution against the wife, and a certain sum having been made under it, the syndic of the creditors of the husband, who had failed pending this suit, applied for the payment of this amount in the hands of the sheriff to him, for the benefit of the mass of the creditors. The district judge determined that the money belonged to the plaintiffs in execution, and not to the creditors, and ruled accordingly. From this decision this appeal is taken.

It appears that, in the interval between the date of the rendition of the judgment of the plaintiffs against the wife and the signing of it, *Miller*, the debtor made a surrender of his property, which was accepted by the judge. A syndic was duly appointed.

There was an appeal taken, by the wife, from the judgment which rendered her liable to the plaintiffs, as before stated. The suit in this court was conducted exclusively by the plaintiffs, and in their name, the syndic being no party to it. The judgment of this court, so far as the present parties are concerned, did not change the judgment of the inferior court. The plaintiffs, at the institution of their suit, had a clear, undisputed right of action, for the purpose of annulling the fraudulent judgment, which stood in the way of their recovering their debt. The law gives to every creditor, where there is no cession of property, and to the representatives of the creditors, where there is a cession, or other proceedings in which they are collectively represented, an action to annul any contract made in fraud of their rights.

The judgment in this action, if maintained, shall be, that the contract be avoided as to the complaining creditor, and the property taken thereby from the debtor's estate, or its value, be applied to the payment of the plaintiffs. Code, 1965 and 1972.

The plaintiffs' action was maintained, and by the judgment of the court the fraudulent judgment was avoided as to them, and a certain sum decreed to them in satisfaction of their debt. The plaintiffs' proceedings were conducted without reference to those of the insolvent debtors. They prosecuted their action on their own responsibility, and at their own cost and expense, on the appeal and in the court below. The syndic took no part in those proceedings, was no party to them; but now, the money being made under the plaintiffs execution, asks for the appropriation of the fruits of the plaintiffs' vigilance and diligence.

We are not called upon to determine what would have been the rights of the mass of the creditors, under the facts presented, had the syndic been a party aiding the plaintiff in searching out and unmasking the property sought to be fraudulently appropriated to their detriment. It is sufficient, for the present decision, that he was not a party to the proceedings in which the plaintiffs' recovered judgment.

We know of no rule of law which would deprive the plaintiffs of the full benefit of their judgment; there is certainly no principle of justice which would justify such a course on the part of the court.

The judgment of the district court is therefore affirmed, with costs.

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*Durant and Horner* for a re-hearing. The attorneys for *Charles Fonda*, syndic of *C. H. Miller's* creditors, respectfully ask for a re-hearing in this case, on the grounds following:

First. That the judgment herein rendered is contrary to L. C. 2172, which says, "The surrender made, according to the forms ordained by law suspends all kinds of judicial process against the debtor." The judgment against *Miller* and wife, in a revocatory action, was signed after *Miller's* surrender. This signing was a judicial process.

Second. It is contrary to sec. 2d, of act 29th March, 1826, Bullard's Dig. 495. "That from and after such cession and acceptance, all the property of such insolvent debtor, mentioned in said schedule, shall be fully vested in his creditors, and shall not be liable to be seized, attached, taken, or levied on, by virtue of any seizure, attachment, or execution, issued against the property of the said insolvent debtor," &c., &c.

Third. It is contrary to the same section, in said act, which says, "The syndic who may be appointed by the creditor, shall take possession of, and be entitled to claim and recover, all the said property, and to administer and sell the same, as is provided by the act to which this is a supplement," &c.

Fourth. It places an erroneous construction on articles 1965 and 1972 of the Code: 1. On article 1965, by ruling that the action given by the law to every creditor, when there is no cession of goods to annul any contract made in fraud of their rights, can continue in the name, and for the benefit of the individual creditor, after a cession lawfully made. (See *Rogers v. Reynolds*, 3 L. R. 462, and *Prudhomme v. Briard* and wife, 32 Sirey, 2 part, p. 84. 2. On article 1972, by ruling that after the cession, "the complaining creditors" are the individual creditors commencing the action. Whereas, by the cession, all debts become due, and all creditors become, in view of this article, "complaining creditors."

Fifth. It loses sight of the real issue between the parties. The syndic does not ask "for the appropriation of the fruits of the plaintiffs' vigilance and diligence." He asks that their privilege, if any they have, may be inquired of in the *concurso*. The syndic says, the money now in the sheriff's hands did, at the date of the cession, belong to *Charles H. Miller*, and passed, by operation of law, to the syndic; and that plaintiffs never had any legal right either to issue their execution or to receive the money from insolvent's wife, even though she had paid it over to the sheriff without an execution. *Blois v. Yard*, 14 L. R. 250. *Nimmo v. Allen*, 2 Ann. 451. *Posey v. Weems*, 4 Ann. 195. Besides, if the plaintiff did receive the money, an action would lie to recover it back for the mass. "Il y a une exception à ce principe,\* et la voici. Si après une saisie des biens du débiteur, ou après le délaissement qu'il en a fait à ses créanciers, un d'eux recevait son paiement, ou du fond des choses saisies, ou de ce qui était délaissé aux créanciers, il serait tenu de rapporter à la masse ce qu'il aurait reçu, parcequ'alors il aurait pris pour soi ce qui appartenait à tous." *Merlin Répertoire*, vol. 7, *Verbo* "Créancier," No. III, p. 5, quoting Law 6. §6 and 7, D. quae in fraudem creditorum, etc.

Sixth. The revocatory action cannot be maintained without the debtor being a party to the suit. The debtor is the main defendant always. He is the principal; the other defendant, joined with him, is regarded as a surety, and can demand discussion of principal's property, before any judgment shall be pronounced in the suit to avoid the contract. The very object of the action, and its necessary effect, being to revoke a contract, and bring back the property into the original debtor. (10 *Duranton*, sec. 574; *Marcadé*, vol. 4, pp. 410, 411.) The contracting parties must be before the court. The action cannot be exercised by the individual creditors, until their debts are liquidated by a judgment; unless the defendant be made a party to the suit for liquidating the debt brought against the original debtor. L. C. 1967. From all the articles, 1965 to 1972 L. C., it is very clear that, without a judgment, or the ability to obtain one in the course of the judicial proceedings, no revocatory action can be maintained. It would be similar to an attachment suit without a defendant, the plaintiff and garnishee alone being before the court. Or to garnishee process under act of 20th March, 1839, (*Bullard's Digest*, 458,) when plaintiff makes a seizure with-

\* The principle alluded to is, that "no payment of a just debt, in money, can be revoked." L. C. 1981.



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out any judgment against defendant. See *Atwell v. Belden*, 1 L. R. 500. *Potter v. Harman*, 1 R. R. 525. *Hyde v. Craddick*, 10 R. R. 395. Now this court admits that a cession was made by *Miller*, before the judgment against him and his wife was signed; and that "a syndic was duly appointed." Here, then, we have a revocatory action, without the original debtor being a party thereto, a revocatory action where plaintiffs have no judgment against their debtor, and where both the lower and appellate court are unable to render one, without annulling the judgment accepting the surrender. The insolvent, *Miller*, being civilly dead, ceased, on the day of his surrender, to be a party to the suit. No judgment could be signed against him. "The judicial officer was rendered powerless for such purpose; and that which had not, when the Constitution (surrender) went into effect, the force and effect of a judgment, became a mere abortion, by the complete withdrawal of official authority, and the positive inhibition of the judge's action." "Hence it has been the uniform and settled jurisprudence of the Supreme Court, from its foundation down to the present time, (June, 1846,) that, until it is signed, the judgment is without efficacy; it is inchoate and imperfect." *Succession of Asbridge*, 1 Ann. 207.

Seventh. The property of a debtor is the common pledge of all his creditors. L. C. 3150, and whether insolvent be dead or alive. *Orr v. Thomas*, 3 Ann. 585. This pledge vests in all his creditors the moment he ceases his payments, under the French law; or as soon as he makes a cession, under ours. *Pardessus*, part 6, tit. 1, chap. 7, and Louisiana authorities cited herein. It seems therefore, that the equity of this case is decidedly in favor of the mass of the creditors.

Eighth. Under the French Code of Com. this case is clearly with the appellants: "A partir de ce jugement, toute action mobilière ou immobilière ne pourra être suivie ou intentée que contre les syndics. Il en sera de même de toute voie d'exécution tant sur les meubles que sur les immeubles." Code de Commerce, ancien texte 442, 494. Nouvelle Rédaction, du présent livre, 443. *Locré*, vol. 19, p. 7.

Ninth. Neither the syndic of the creditors of *Miller* nor *Miller* himself, was made party to the original appeal. Neither of them can legally be blamed for not having made themselves parties. In truth, the syndic was not appointed till some two months after *Miller's* failure. It was the duty of *Mrs. Miller* to make proper parties to her appeal, and the duty of plaintiffs to profit by its omission. C. P. 903.

We pray for a reversal of the judgment in favor of the syndic, with costs.

Re-hearing refused.

### J. A. MAILLET et al. v. PAULIN MARTIN.

Proof of compensation cannot be received where the defendant's plea of compensation is vague and indefinite. Such a plea should state the nature and amounts of the claims, with such precision as to prevent the plaintiffs being surprised.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Canonge*, for plaintiffs. *Dufour*, for appellant. By the court:

ROSE, J. Under an amicable settlement between the plaintiffs and the defendant, involving various commercial transactions, the latter agreed to pay, and did pay said plaintiffs, \$3500, and assumed to pay *Peter Maillet*, of the Island of Martinique, the further sum of seven thousand francs, if so much was due him by the plaintiffs; and, if less was due, he bound himself to account to them for the difference. Subsequently the defendant paid *Peter Maillet* four thousand three hundred and eighty-seven francs fifty-five centimes, under this agreement, and took his receipt for that amount.

The plaintiffs, admitting this payment to have been properly made, alleged this to have been the whole amount of their indebtedness to *Peter Maillet*, and

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now claim from the defendant the remainder of the seven thousand francs, under their agreement with him.

The defence set up is, that the indebtedness of the plaintiffs to *Peter Maillet* exceeded seven thousand francs, and that the whole amount has been settled by compensating a portion of it with certain claims the defendant held against him, and by paying the remainder in cash, as appears by the notarial receipt in the record.

On the trial of the cause the defendant offered evidence to prove these allegations, and also for the purpose of showing that, in the settlement, the agent of *Peter Maillet* claimed at first the full amount of the seven thousand francs, but afterwards agreed to the compensation proposed, and a notarial receipt was given for the amount paid in cash.

Upon the objection of the plaintiffs' counsel, the court refused to admit proof of compensation, because the defendant had not pleaded compensation with sufficient precision to enable the plaintiff to offer proof to the contrary. The defendant took a bill of exceptions.

The evidence having been excluded, the defendant failed to substantiate his allegations, and the case is before us on an appeal from the judgment rendered against him. We are of opinion that the plea under which the evidence of the defendant was offered, was too vague and indefinite to justify its admission. It did not state the nature and amount of the claims compensated, and would have operated a surprise to the plaintiff.

The plea in the case of *White v. Moreno*, 17 L. R. 372, was the same as that of the defendant. The court then refused to admit the evidence, on the ground that the specific amounts paid, and the date of the payments were not stated in the answer. The case turned upon the principle that pleas in compensation should be set forth with the same certainty as to the amounts, dates, &c., as if the party opposing them were himself a plaintiff in a direct action. This decision was reviewed and affirmed in the case of *Smith v. Scott*, 3 R. R. 258.

The principle of these decisions being a rule of practice, clearly deducible from the article of the code which provides, that compensation must be pleaded specially, we feel bound to adhere to it. The judgment must, therefore, be affirmed. The rights of the defendant, for so much of the plaintiffs' debt, as *Peter Maillet*, which he may have extinguished by compensation, remain unimpaired.

It is ordered, that the judgment in this case be affirmed, with costs.

### PURVIS, WOOD & Co. v. AVERY BREED.

Money was deposited with *Purvis, Wood & Co.* for *Breed*; *Breed* sued to recover it, and *P. W. & Co.* plead a debt due them by *Breed*, in compensation. The plea was overruled. *Breed* had judgment. *P., W. & Co.* then paid the money into the hands of the sheriff and immediately attached it. *Held*: That the attachment did not lie.

The sheriff is the proper officer to make a seizure, at the suit of a third party, of money which he has received under execution. The coroner is not competent to make the seizure in such a case.

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**A**PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Bonford and Finney*, for plaintiff. *J. Ad. Rozier*, for defendant.

In the case of *Avery Breed v. Thomas M. Hand*, a judgment was recovered against the plaintiff, in the parish of Union, for \$504 97, exclusive of interest and costs. A *fi. fa.* issued on the judgment, and was sent to the coroner of the parish of Orleans, who seized, in the hands of the sheriff, the money which had been paid by *Purvis, Wood & Co.* to the sheriff, in satisfaction of the judgment of *Breed* against them. The question arose, whether the seizure should have been made by the sheriff or by the coroner. On this point the district court said:

"As to the second execution, I am of opinion that the sheriff was not interested in the suit in the sense of the law. If his claim for costs made him so, he is interested in every case, and all executions must go to the coroner."

By the court:

SLIDELL, J. This is an attachment against *Breed*, upon a debt alleged to be due by him as a member of the firm of *Hand and Breed*. A motion was made to set aside the attachment, which was sustained by the district judge, and the plaintiffs have appealed.

The material facts are these. *Breed* formerly brought suit against *Purvis, Wood & Co.* for a sum of \$1021, deposited with them for him. They filed a plea of compensation, alleging that *Breed*, as a member of the firm of *Hand and Breed*, was indebted to them in the sum of \$1021, balance on account current. There was judgment in favor of *Breed* for the amount of the deposit. The plea of compensation was dismissed, on the ground that, to a demand of a deposit, such a plea was inadmissible. *Purvis, Wood & Co.* appealed, and the judgment was affirmed by this court, the case being considered as controlled by that equitable rule of our code, that "the depositary cannot withhold the thing deposited, on pretence of a debt due to him from the depositor, on any account distinct from the deposit, or by way of offset." Art. 2927.

Execution was then issued by *Breed*, against *Purvis, Wood & Co.*, on that judgment, and they paid into the sheriff's hands its amount in coin. On the next day, while the money was yet in the sheriff's hands, *Purvis, Wood & Co.* took out the present attachment, their suit being founded on the same claim which they had unsuccessfully pleaded in compensation.

The spirit of the same rule which controlled the former cause, is, in our opinion, decisive of this. Why was the plea in compensation rejected? Because such a defence was repugnant to the nature of the contract under which *Purvis, Wood & Co.* received the money for *Breed*. It was a contract of irregular deposit, to which, so far as our present inquiry is concerned, the equitable rules of the contract of deposit apply. This contract is one of confidence. It is considered, under all systems of jurisprudence, as imposing the duty of the most scrupulous good faith. Among the Romans, it was classed in the category of contracts *bonæ fidei*. From its confidential character arose, with them, the rule embodied in our code. *In causa depositi compensationi locus non est*. And so strictly was this principle carried out under that jurisprudence, from which our own is derived, that the depositary was not permitted to detain the thing deposited with him in compensation of what the depositor owed him, even although it were another *depositum*; but each depositary was obliged promptly to restore the thing deposited with him. *Quam celerrime, sine aliquo obstaculo restituantur*, was the stringent and uncompromising doctrine of the Roman law. The

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interpretation invoked at bar, which would restrict the depositor's equity to a mere immunity from a plea of compensation, sacrifices the spirit of the law to a narrow consideration of its letter. But, in truth, the letter of the law is not so narrow as was suggested in argument. It imposes on the depository the duty of instant return upon demand. Art. 2926. It forbids him to withhold that return on pretence of a debt due to him from the depositor on any account distinct from the deposit. Art. 2927. The form, then, in which the resistance to the right of the depositor comes, is immaterial. The spirit of the rule covers any substantial resistance. The deposit must be restored, *sine aliquo obstaculo*.

Here an obstacle is interposed by the depository. He arrests the money with one hand which he proffers to pay with the other, and attempts to accomplish indirectly, what in the previous action he was not permitted to do directly. We think the district judge did not err in dismissing the attachment. See also case of *Lapeyre v. Orleans Ins. Co.*, 7 Ann.

We also concur in the opinion of the district judge as to the seizure in the case of *Breed v. Hand*.

Judgment affirmed, with costs.

Application for re-hearing refused.

ROBERT A. GRINNAN v. BATON ROUGE MILLS COMPANY.

The factory of defendants was at Baton Rouge. They had, in connection with it, an office and agency in New Orleans, where they raised funds for the prosecution of its business, and where the partners resided, and where also the membership of *Peale* was well known. *Peale* retired from the company, and gave notice of his withdrawal in a paper published at Baton Rouge, but did not publish his retirement in New Orleans, where *Grinnan* resided. *Held*: A retiring partner is bound to use reasonable diligence, to inform the public. The extent of diligence must be measured with a reasonable regard to the circumstances of the case, and ought not to be brought down to the inflexible standard of publication at the partnership domicil, where such standard would expose the public to an inequitable risk. The retiring partner was held bound.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Wolfe and Singleton*, for plaintiff. *Mathewson, and Hunton and Bradford*, for defendant. By the court:

SLIDELL, J. The question involved in this case is the liability of *Eljel Peale* to pay the bills sued on, as a partner in the Baton Rouge Mills Company, an unincorporated association.

The partnership domicile was at Baton Rouge. Its mills were established there, and its business was the making of bricks and sawing lumber. It had an office for the sale of its bricks and lumber in New Orleans, kept by an agent. Receipts to purchasers at this office, the transactions of which were however small, were made out in the name of the Baton Rouge Mills Company. It was assessed in New Orleans, by reason of this agency, upon the municipal assessment roll of 1850. Its members, including *Peale*, resided in New Orleans. The raising of funds for the company was accomplished in New Orleans, by means of bills drawn by its agent upon *McMain*, of New Orleans, one of the partners. A large amount of money was raised for the company in this way.

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partly before, and partly after the withdrawal of *Peale*. He withdrew in the latter part of October, 1850. The drafts in question bear date in the following December. *McMain* had them negotiated through a broker to the plaintiff, in December and January. The plaintiff had previously, in the same year, discounted upon the application of the same broker a similar bill, and before doing so, was informed by the broker that *Peale* was a member of the company. He was a person in good credit, and the broker testifies that he represented to *Grinnan* on that occasion, and to others on like occasion, that *Peale* was a partner, because he considered that made the paper very good. The only notice of *Peale's* withdrawal was published in the *Baton Rouge Gazette*, on the 14th December, 1850. No actual notice is brought home to the plaintiff.

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There was judgment below in favor of the plaintiff, and *Peale* now asks its reversal.

It is conceded that the case turns solely upon the sufficiency of the notice of the withdrawal, by publication in the *Baton Rouge Gazette*.

It is said that *Grinnan* must, under the circumstances, be considered as a previous dealer with the company, and therefore the case is one requiring proof of actual notice. This question is free from difficulty, as may be seen from the elaborate discussion upon the point, what constitutes a previous dealing, to be found in *Vernon v. Manhattan & Co.*, 17 Wendell, 527. 22 Wendell, 189, and other cases. We do not however think it necessary to decide whether the purchase of the previous bill by *Grinnan*, through a broker, put him on a footing of a previous dealer. For we are of opinion that the general notice, as given, was insufficient. To bind the New Orleans public, it ought, in our opinion, to have been published in New Orleans.

The general rule, as invoked by the defendant, is true, that as to those who have had no dealings with a firm prior to its dissolution, notice by advertisement in a newspaper of the city or county where the business is carried on, will suffice. But here, although the factory of the firm was in *Baton Rouge*, and so an important portion of its business was conducted there, yet an important portion of its business, the raising funds for its prosecution to a large amount, was carried on in New Orleans, where its partners lived, and where the membership of *Peale*, whose credit appears to have been the most conspicuous, was well known; to which we are also to add the existence of the New Orleans office and agency above stated. Now, under such circumstances, to say the New Orleans public are to be held constructively warned of *Peale's* retirement by a notice in a *Baton Rouge* newspaper, whose ordinary circulation cannot be supposed to reach beyond the narrow sphere of a village journal, seems to us unreasonable. A retiring partner is bound to use reasonable diligence to inform the public. The extent of diligence must be measured with a reasonable regard to the circumstances of the case, and ought not to be brought down to the inflexible standard of publication at the partnership domicile, where such standard would expose the public to an inequitable risk. The defendant must be supposed to have been fully apprised of the mode in which the company was in the habit of raising money in New Orleans, and conscious of the credit his name gave the partnership. He might reasonably anticipate a similar course of financiering after his withdrawal, and a similar reliance in the New Orleans money market, upon his connection with the firm, unless he gave his retirement publicity here.

It remains only to notice a bill of exception taken to the rejection of *Frierson* as a witness, who was offered by the defendant.

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He was the husband of *Mrs. Frierson*, one of the defendants in this cause, and among other grounds was objected to, on the score of interest and incompetency, under art. 2260 of the Code, which provides, that "the husband cannot be a witness either for or against his wife." It appears from the evidence, that in October, 1850, *Peale* sold his interest in the company, to the remaining partners, one of whom was *Mrs. Frierson*. As between *Peale* and the other members of the company, it is clear that *Peale* does not owe the amount sued for, and the company does. The company and its members are bound in law and good conscience to hold him harmless against all the partnership liabilities and the costs of the prosecution against him. If the remaining partners had discharged their duty, by paying the debt, he would not have been distrusted. The costs of this suit would not have been incurred by him. *Mrs. Frierson* and her associates are liable to *Peale* for the costs incurred by him in this suit. If *Frierson's* testimony defeats the plaintiff's claim, her husband thus relieves her from liability for those costs. The court therefore did not err in rejecting him as a witness.

Judgment affirmed with costs.

### IN THE MATTER OF O'FLAHERTY—On the Opposition of JONES AND UFFORD.

A creditor, holding a joint note, may have it placed on the tableau of distribution of one of the debtors, without citing the other joint debtor.

**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Wolfe* and *Singleton*, for opponent. *A. A. Melleart*, for curator. By the court:

**DUNBAR, J.** The opponents, *Jones* and *Ufford*, claim to be placed on the tableau of the curator of the absentee, *James O'Flaherty*, for the sum of \$1455 96, with interest, which they allege is due to them on bills, drafts and open account.

The district judge ordered them to be placed on the tableau for \$727 26, with interest from judicial demand, and they have appealed.

The judge arrived at this amount by rejecting a joint note for \$448 with interest at ten per cent per annum until paid, drawn by *O'Flaherty* and *Hudson*, dated Galveston, 5th May, 1850, payable twelve months after date, to the order of *Jones* and *Ufford*, and also rejecting a draft of *O'Flaherty* for \$253 77, drawn by him in favor of *Henry Hubbell* on *Jones* and *Ufford*, and paid by them for the accommodation of the drawer. The reasons given by him for the rejection of the joint note are, that *Wm. M. Hudson*, the other joint obligor, should have been joined in the suit, under the provisions of the Civil Code, Art. 2080, which declares that: "In every suit on a joint contract, all the obligors must be made defendants, and no judgment can be obtained against any, unless it be proved, that all joined in the obligation, or are, by law, presumed to have done so." and further, that a note, or due bill of *O'Flaherty*, for \$776 99, had been given to plaintiff at a posterior date to this joint note, for balance of account to its date.

We cannot see, for what useful purpose, *Wm. M. Hudson*, the joint obligor, IN THE MATTER OF O'FLAHERTY. could have been brought into court, upon the trial of the tableau of the curator of *O'Flaherty*. It appears from the evidence, that he lives out of the jurisdiction of the court, in the State of Texas, nor it is pretended that he has made any payment on said note. In fact, in his own deposition taken in the cause, he admits the justice of the claim. In the case of *Brown v. Robinson and Hassam*, 6 Ann 423, it was said: "That the art. 2080 of the Civil Code, if literally construed, would sanction such palpable injustice, as to render it absurd. If the plaintiff is content with judgment against those cited for their share of the debt, and there is no ground to believe that those not cited could make defence to the action, not within the power of those before the court, we see no reason why the defendants cited, should not be rendered liable for their shares of the debt, and discharged from all claim for the shares of others."

The other ground for rejecting this joint note is equally untenable. We cannot see why it should be inferred, that this joint note had been paid by *O'Flaherty*, from the mere circumstance of a settlement of his individual account, by the giving of his individual note. on the 1st November, 1850, to *Jones and Ufford* for balance of account to date. The joint note of *O'Flaherty* and *Hudson*, was not then due, and did not mature until the 5th of May, 1851. We think there is no good reason for such an inference.

The district judge also rejected a draft of *O'Flaherty* for \$253 77, as before mentioned. The objection urged to the liability of *O'Flaherty* on this draft, was, that his name as drawer had been erased. It is satisfactorily shown, that the draft was drawn by him for goods furnished his vessel; that *Jones and Ufford* accepted for his accommodation, without funds, and paid it to the holder; that, at that time, there was no erasure of the drawer's name, and is proved, by several witnesses, that at Galveston, where *Jones and Ufford* resided as merchants, it is the usual practice, after a draft is taken up by the acceptors, to erase all the names thereon.

The judgment of the district court must therefore be reversed, and the several rejected items, above commented on, allowed. Ten per cent interest is stipulated in the joint note, and will be allowed, as it is shown by evidence, that it is not unlawful in the State of Texas, where the contract was made.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be reversed, and that there be judgment in favor of *Jones and Ufford* against the curator of *O'Flaherty*, for twelve hundred and five dollars, with five per cent per annum interest on \$727 26, from judicial demand, with like interest on \$253 77, from the 20th January, 1851, and with ten per cent per annum interest on \$224, from the 5th May, 1850, to be paid in due course of administration, by the said curator, with costs in both courts.

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### A. T. STEWART & Co. v. W. M. and J. LAPSLEY et al.

A judgment creditor required the sheriff to execute a *fi. fa.* on certain property, and gave an indemnity bond in favor of the sheriff, in which they and their sureties bound themselves to save him harmless, defend all suits that might be brought against him, and pay all damages and judgments that the sheriff might be made liable for in consequence of the seizure

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and detention of the goods taken in execution. A person who claimed the property, and the judgment creditors and the sheriff for damages on account of the seizure. The judgment creditors employed counsel to defend the suit. *Held*: The sheriff had a right to select his own counsel, and under the bond, the judgment creditors and the securities on the bond were liable for the payment of the fee.\*

**A** PPEAL from the Second District Court of New Orleans, *Lea, J. Hart and Reese*, for plaintiffs. *Grymes*, for defendant. By the court:

EUSTIS, C. J. The plaintiffs were judgment creditors of the *Lapsleys*, and took out an execution and caused to be seized under it the stock in trade of the dry goods store kept by the defendants, at No. 13 Chartres street, in this city. On making the seizure, the sheriff was warned, by *N. E. Turner*, that the stock of goods was his property, and not that of the defendants, and that he would hold the sheriff responsible for all damages sustained by him in consequence of said seizure.

*Turner* alleged, that he had bought out the stock of the *Lapsleys*, and, it appears, was in possession of the store under the bill of sale, which he exhibited. The sheriff, however, went on with the seizure, and sold the goods under execution, at the instance and order of the plaintiffs. *Turner* sued the sheriff and the *Lapsleys* for damages, and recovered against them *in solido* a verdict of \$12,000, on which judgment was rendered. As the plaintiffs were bound to indemnify the sheriff, in the same proceedings judgment was rendered in his favor against them for the amount. The parties cast appealed to this court, and on the appeal the judgment of the lower court was reversed, and judgment rendered in their favor. This court held the sale to *Turner* fraudulent; that the seizure of the goods in *Turner's* possession was not lawful, but that the sale being in fraud of creditors, the only damages the sheriff or the parties were liable for to him were nominal, and not to be heeded by the court.

The plaintiffs directed the sheriff to make the seizure of the goods, and it was maintained at their instance, and on their executing an indemnity bond in favor of the sheriff, in which they and their sureties bound themselves to save him harmless, and defend all suits that might be instituted against him, and pay all damages or judgments that the sheriff might be made liable for in consequence of the seizure and detention of the goods taken in execution.

On the termination of this litigation, the plaintiffs took a rule on the sheriff, to show cause why he should not pay over to them the amount of money in his hand, made under the execution out of the goods seized. The sheriff claims the right of deducting from the amount the cost incidental to the third opposition of *Turner* to the seizure under execution, and also the amount of a fee paid by him to his counsel for conducting his defence of the suit in which *Turner* obtained judgment against him and the plaintiffs.

The district judge disallowed both of these claims, on the proceeds of the sale, and the sheriff has appealed.

In relation to the item of costs of *Turner's* opposition, our impression is, that these costs being incurred by the seizure, and the plaintiffs being bound to save the appellant harmless from all costs and expenses, the plaintiffs are bound to pay them to the sheriff, and they can recover them from *Turner*. This relates to the taxable sheriff's costs; as to the clerk's costs, the sheriff can have no right to deduct them from the plaintiffs' money.

\* See acts of 1853, p. 267.



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In relation to the amount claimed for the fee, we observe that the bond, in general terms, provides to hold the sheriff harmless, and that no question is made, except as to the plaintiffs' liability to pay the appellant this sum, and as to its amount. The matters were investigated in the court below informally, on an answer to a rule to show cause, and no objection is taken to the form of the proceeding or the right of the appellant to deduct this amount, provided it should be due to him from the plaintiffs.

We understand the law to be, that where the obligor of an indemnity bond undertakes, generally, to save harmless from the consequences of a particular act, the bond is forfeited by the obligee being damnified, and that a debt consequently accrues upon that event.

*Mr. Grymes* was the counsel employed by the appellant, and the sum paid him for his services was one thousand dollars. The cause was twice tried before a jury; there was one mistrial, the jury not being able to agree. The cause was fully argued in this court. *Mr. Grymes* was the attorney on record for the appellant. It does not appear that there was any contract or understanding between the appellant and the plaintiffs concerning the management of the cause or the employment of counsel. The plaintiffs had their own attorneys, and, on the second trial, employed additional counsel, and paid him the sum of one thousand dollars. The case was one of unusual difficulty and notoriety. The trials before the juries lasted several days. *Mr. Grymes* argued the case on both occasions, and concluded the argument for the appellants in this court. The parties, sued by *Turner*, made common cause in the defence, and we think the evidence fully supports the reasonableness of this charge of one thousand dollars, according to the standard of fees received for professional services by counsel of eminence.

Had the appellant a right to engage counsel at the expense of *Stewart & Co.*? We think he had. The case of *Peck v. Acker*, 20 Wendell Rep. 605, is conclusive as to that right. He was not bound to put his interests into the hands of the counsel selected by them. Indeed the record shows, that when the sheriff was sued, and called *Stewart & Co.* in warranty to defend the suit, their attorneys filed a plea that they were not bound in warranty to him, and prayed to be dismissed, &c. For his own interest he had a right to employ counsel, and having paid no more than a just compensation for services of the most efficient kind, the amount must be refunded to him by the party who stands bound to save him harmless. The expense of defending the suit of *Turner*, was certainly much greater than it might have been, but this is exclusively the affair of the plaintiffs, and the result of their choice. It is clear that the right of the appellant to be indemnified, or to be saved harmless, cannot be affected by this fact.

It is therefore ordered, adjudged and decreed, that the judgment of the court below be reversed, and that the sheriff, *John L. Lewis*, defendant herein, have credit for the sum of \$1000, paid his counsel, and for all the other costs and charges set forth in the account annexed to his answer, with the exception of the clerk's fees charged therein, as paid to *T. C. Poole*, amounting to \$30 60, leaving a balance due by said defendant, in rule to the said plaintiffs, of \$3125 17, instead of \$3094 57, as shown by the said account. It is further ordered and decreed, that the plaintiffs and appellees pay costs in both courts.

## WATERS &amp; Co. v. J. H. MADDOX.

*Crockett, Garland & Co.* dissolved partnership, and *Crockett* went into business with *Maddox*. He gave a note in the name of the new partnership, for a debt of the old firm, of which fact the holder was aware. Suit was brought against the new firm on the note. *Held*: Under such circumstances, it was incumbent upon the plaintiff to have shown that the debt had been assumed by the new firm, for the sake of some benefit or credit derived from the assumption.

**A** PPEAL from the Second District Court of New Orleans, *Lea, J.* *Hamner and Hays*, for plaintiff. Are editors, owners and publishers of a newspaper, commercial or ordinary partners?

We say they are commercial partners, under the 2796 article of the Code, which says: "Commercial partnerships are such as are formed for the purchase of any personal property and the sale thereof, either in the same state, or changed by manufacture." Proprietors of a newspaper buy and sell paper changed by manufacture. Paper is personal property. Then, under the terms of the law, they are commercial partners. The amount of personal property that is bought and sold, or its relative value to the labor, skill and intelligence of the change produced in its condition, or whether it is sold by the sheet or ream, or by so much for a number of sheets per year, is not the test as to partnership. 'Tis not so nominated in the bond. Is it personal property? is it bought? is it sold? Buying, sawing, and selling timber, forms a commercial partnership. 14 L. R. 244. 3 K. R. 130. An association for distilling, forms a commercial partnership. 15 L. R. 287. When one person furnishes the funds to purchase an article, and another his credit, skill and industry in preparing it for sale, it will constitute a commercial partnership. 11 R. R. 136. Exchange dealers are commercial partners. 12 R. R. 132. The purchase of slaves in another State, and sale in this, constitutes a commercial partnership. 2 Ann. 876. The publishing of a newspaper is eminently commercial; it is almost formed and sustained by commerce, and by no fair reasoning can it escape the words of the text, or the tendency and leaning of the decisions. Policy and reason alike dictate that all commercial transactions should carry about them solidarity. *Dalloz*. *Dictionnaire de Jurisprudence, partie supplémentaire*, title *Actes de Commerce* No. 69; *Pardessus, Droit Commercial*, No. 1, p. 18.

*E. R. Olcott*, for *Maddox*. By the court:

SLIDELL, J. For the reasons assigned by the district judge, judgment is affirmed.

The following is the judgment of the district court:

"This case is presented upon the issue, made herein by the defendant *Maddox*, that the note sued on was given by his co-partner, *Crockett*, without his consent or knowledge, for a debt due by the firm of *Crockett, Frost & Co.*; and further, that previous to the date of the note, the firm of *J. H. Maddox & Co.* had been dissolved, as between the parties, and that the note was given, as above stated, by *J. W. Crockett* without authority. Defendant further alleges that the partnership of *J. H. Maddox & Co.* was not commercial, but was a particular partnership, they being engaged in publishing a newspaper. It is not in my opinion, necessary to examine more than one of the points urged in the defence, viz, that the late firm of *J. H. Maddox & Co.* are not liable for the debt of *Crockett, Frost & Co.* The evidence conclusively shows, that the note sued on was given for a debt of the old firm, by *Crockett*, and that the holder was aware of this fact. Under such circumstances, it was incumbent on the plaintiff to have shown that the debt had been assumed by the new firm, for the

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sake of some benefit or credit derived therefrom. But no such assumption is established by the evidence. The payment of some of the debts of the old firm, without any proof of an obligation to do so, does not establish a contract. The plaintiff must have known that he was receiving the supposed obligation of *Maddox* for a debt which he, *Maddox*, had no interest in discharging, unless there had been an assumption of the debt by the new firm. The presumption of law is against any such liability, and I do not consider that, "this presumption has been removed by due and satisfactory proof of a contrary intention and agreement." Story, on Partnership, 152. The defendant is not, perhaps, entitled to an absolute judgment in his favor; but am satisfied that the plaintiff is not, under the evidence, entitled to a judgment.

"The court, having duly considered this case, for the reasons assigned in the written opinion this day delivered and on file, it is ordered, adjudged and decreed, that as respects the plaintiffs' claim against the defendant, *J. H. Maddox*, there be judgment of nonsuit."

### A. H. HAYES et al. v. JOHN W. CROCKETT and JOSEPH H. MADDOX.

The vendor's privilege does not extend to personal property which has passed into the hands of a third purchaser, although such purchaser may have known of the embarrassed circumstances of his immediate vendor.

**A** PPEAL from the Second District Court of New Orleans, *Lea, J. Bonford* and *Finney*, for plaintiffs. *Mott* and *Frayser*, for *Maddox*. By the court:

SLIDELL, J. For the reasons assigned by the district judge, judgment affirmed.

The following is the judgment of the district court:

"This case differs from that of *Waters & Co.* against the same defendants, in but one material point. The plaintiffs sue upon the original obligations of *Crockett, Frost & Co.*, given as the price of the Crescent newspaper establishment, alleging an assumption by *J. H. Maddox & Co.*, of the payment of the notes sued for the payment of which they claim a privilege upon the materials of said establishment.

"The evidence does not, in my opinion, establish any assumption of the debts of *Crockett, Frost & Co.* by *J. H. Maddox & Co.*, and the vendors' privilege does not extend to personal property which has passed into the hands of a third purchaser. It is clearly shown that, prior to the institution of this suit, *Maddox* purchased the Crescent newspaper establishment, 'including the types, presses, fixtures, circulation, good will, &c., thereto belonging.' It is contended that this purchase was a fraud upon the vendor, having been made with a knowledge of his (the vendor's) rights, out of the usual course of business, to the injury of plaintiffs. It is evident that *Maddox* knew of the embarrassments of the firm of *Crockett, Frost & Co.*; he, perhaps, knew that they were insolvent, and it is not improbable that he may have known that the plaintiffs were their creditors, but it is by no means certain that he was acquainted with the nature of their privilege.

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"The case of *Beck & Co. v. Brady et al.*, is referred to by plaintiffs' counsel, as authority in this case. The two cases present scarcely any points of resemblance. *Maddox* appears to have the means of meeting his obligations (at least the contrary is not pretended). He paid not only a fair price, but one far above the value of the establishment; and he cannot be said to have purchased out of the usual course of business, inasmuch as no course of business is shown to prevail in relation to sales of this character. If, instead of purchasing a newspaper establishment, *Maddox* had, under similar circumstances, purchased a quantity of dry goods, hardware, or other movables, on terms corresponding with the usual business credits, which goods, after the purchase, had been removed to another store, it appears to me, that neither his possession nor title could be disturbed. See C. C. 1981, 2628.

"The fact that a newspaper establishment is not susceptible of convenient removal, ought not to prejudice the rights of a purchaser. If the doctrine contended for by the plaintiffs' counsel be correct, then no sale made by one in an actual or supposed state of insolvency, to one acquainted with the fact, would be valid, though made for a valid consideration, and in the usual course of business. See 12 L. R. 263.

"Perhaps the defendant is not entitled to an absolute judgment in his favor, but, under any view of the case which I have taken, the plaintiff cannot recover.

"The court having duly considered this case, for the reasons assigned in the written opinion this day delivered and on file, it is ordered, adjudged and decreed, that there be judgment of nonsuit herein, so far as relates to plaintiffs' claim against *J. H. Maddox*."

### LOWE and PATTISON v. NELSON, BRADLEY & Co.

This action was brought to recover damages from the vendor of cotton, on the ground that when the bales were opened, it was discovered that the cotton was "country damaged."

*Held*: It is indispensable for the plaintiffs' action, that they should prove the existence of the damage at the date of the sale, and should show the extent of that damage with such reasonable certainty as to enable the court to assess the just reduction of price. The burden is on the plaintiffs to make the facts reasonably clear and certain.

**A** PPEAL from the Third District Court of New Orleans, *Kennedy, J. A. N. Ogden*, for plaintiffs. *Benjamin and Micou*, for defendants. By the court:

SLIDELL, J. The plaintiffs bought of the defendants, at New Orleans twelve hundred and five bales of cotton, for which they paid the sum of \$39,343 41. The sale was made in the month of August. It was shipped, in that month, to Glasgow, and upon examination by two brokers there, after landing, they gave a certificate that nine hundred and sixty-eight bales were "country damaged," and two hundred and eighteen were in so bad a state that, to make them merchantable, it was necessary to pick and recover them. They certified that, had the cotton been sound, the damaged sold as pickings would have been worth £127 7s. 4d.; but, as pickings, it was worth, and brought, only £86 14s. 7d. They also certified the cost of picking and recovering 218 bales at £31 1s.

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They estimated the proper allowance for damage, on the 749 bales, which did not require picking and recovering, at £13 1s. They thus exhibit "a loss from country damage" of £155 8s. 9d. For this amount the plaintiffs sue, alleging that the cotton was thus unsound at the date of its package.

The district judge rejected the item of £13 1s. on the 749 bales, considering the alleged damage too insignificant to require notice, especially as it was a mere probable estimate, not established by actual picking, and for other reasons stated in his opinion. As the claim for that item is not pressed here by the plaintiff, it may be dismissed without further remark. Our attention will be confined to the reclamation as to the 218 bales.

It must be observed, in the outset, that it is indispensable for the plaintiffs' action, that they should prove the existence of the damage at the date of the sale, and should show the extent of that damage with such reasonable certainty as to enable a court to assess the just reduction of price. The burden is on the plaintiffs to make these facts reasonably clear and certain.

We have examined, with great care, the voluminous testimony offered in this cause. In some respects, it is conflicting; in others, indefinite. Hence we shall decline deciding, in this case, whether "country damage" of cotton, in bales, is an apparent defect within the meaning of the 2497th article of the Code. It is sufficient for the purposes of this suit, to say, that the evidence does not establish with reasonable certainty the extent of damage, if any, that existed at the date of the sale. To explain our reasons for this opinion, some detail is necessary.

The Glasgow brokers, on whose certificate the reclamation is based, were examined as witnesses under commission. They concur in saying that, by "country damage," they understand, damage received before the bale is put on board ship; that damage incurred by exposure to rain, in New Orleans, would be considered by them as "country damage;" and that they are unable to distinguish, at Glasgow, between damage before arrival at New Orleans and damage after arrival at New Orleans, by any visible effect upon the cotton in the bales. Now it is clearly established, by the concurrent testimony of all the witnesses, that during the period which intervened after the delivery of the cotton to the plaintiffs, and the completion of the lading on shipboard, there was much bad weather. Every day, say the witnesses, there were heavy showers, which would last an hour or two, followed by a hot sun; and portions of the cotton were necessarily exposed to it, during the transit from the press and while on the wharf, where it was not protected by tarpaulins. It is also proved, by several witnesses, that if cotton is put wet on board of ship, it is apt to rot the bagging, and cause injury to the contents of the bale. A witness, of much experience, states that cotton is more liable to injury from rain in warm weather, and when it has attained a certain age, than when new. Now, when we consider that this cotton, before delivery to the purchaser, had passed through the usual inspection, classing, and approval by an experienced broker selected by the plaintiffs, and was considered merchantable by the pressman and the weigher, and yet, upon its arrival at Glasgow, a portion of it is found to be damaged, in the manner described by the Glasgow brokers, it is certainly more reasonable to attribute this damage, in part at least, to the exposure to rain in New Orleans, after delivery to the purchaser, than to suppose its entire previous existence, and that it had escaped the vigilance of the broker, the weigher, and the purchaser himself, who was in the yard several times during the delivery of the cotton.

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It therefore seems inadmissible, under the facts of this case, to assume that the entire damage, as exhibited at Glasgow, existed at the time of the delivery; while, on the other hand, if some of the bales were defective at the date of the sale, the evidence furnishes us no means of apportioning the damage then existing, and that which occurred in consequence of the subsequent exposure to rain and confinement in the hold of the ship. No attempt to make such apportionment appears to have been made by the district judge.

Aside from the question, whether "country damage" is an apparent defect of which the buyer must take notice, we think it obvious that it would be highly inconsistent with the interests of commerce, to let in reclamation, on the ground of "country damage," for comparatively small amounts, based upon an *ex parte* inspection in a distant country, after the exposure incident to shipment and transportation, without very clear and conclusive evidence. And, if courts demand stringent proof in such cases, it will lead to a mercantile vigilance on the part of buyers, and will probably tend, eventually, to the advantage of all parties interested in the great staple of our country, by inducing more care on the part of carriers, pressmen, and factors.

It is therefore decreed, that the judgment of the district court be reversed, and that there be judgment for the defendants; plaintiffs paying costs in both courts.

#### SUCCESSION OF DUFOUR.—On an Opposition of M. BARNETT.

Judges are not authorized to supply the plea of prescription; but, after the time required to sustain that plea has intervened, slight evidence of payment, or of the remission of the debt, is sufficient to satisfy the mind.

**A**PPPEAL from the Second District Court of New Orleans, *Lea, J. J. Magu.* for opponent. *Bayne and Legendre*, for curator. By the court:

ROST, J. This is an appeal from a judgment dismissing the opposition of *M. Barnett* to the provisional tableau, filed by the curator of the succession of *Dufour*.

The claim upon which the opposition rests, bears date the 24th February, 1841, and the opposition was filed on the 27th May, 1852.

Why the prescription of ten years was not pleaded in bar of the action is a mystery to us, although we are of opinion with the district judge, that this plea is not indispensable to the success of the defence. It is true that judges are not authorized to supply the plea of prescription; but, after the time required to sustain that plea has intervened, slight evidence of payment, or of the remission of the debt, as the case may be, is sufficient to satisfy the mind. The evidence in the record and the long silence of the opponent, raise a violent presumption, that the claim of the opponent for commissions was remitted when the sale was rescinded, and he settled with *Dufour* for the actual costs incurred in making it. The district judge acted upon that presumption, and we are unable to say that he erred. *Davenport v. Labauve*, 5 Ann. 141.

Judgment affirmed, with costs.

## L. A. GUNST v. RIKA BRULL et al.

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Although the law prohibits a wife from becoming the surety of her husband, yet, if after her husband's death, she borrow money to pay his debts, she will be bound to repay it.

**A**PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Gedge and Hagan*, for plaintiff. *J. S. Whitaker*, for defendant. By the court :

**DUNBAR, J.** This suit is brought to recover of the defendant, *Rika Hernsheim*, now wife of *Israel Brull*, \$1160, with eight per cent interest from the 2d of September, 1851, the balance alleged to be due on one of three several promissory notes secured by mortgage.

The defence set up is, that the said notes were given in error, without consideration, and were obtained by fraud. The defendant further alleged, that she had already paid two of these notes in ignorance of her rights; pleads the same in reconvention, and prays that the note sued on may be cancelled.

The district judge ordered the note sued to be cancelled, and the mortgage to be erased. He further gave judgment for defendant, for the sum of \$1600, with interest from the 1st of December, 1851; and the plaintiff has appealed.

It appears that the defendant, *Rika Brull*, then the wife of *Joseph Hernsheim*, on the 26th of January, 1843, in the Parish Court of New Orleans, in a suit for separation of property, obtained a judgment against her husband for \$4125, with interest from the 26th of January, 1843, and that afterwards, on the 28th of February of the same year, the said judgment was satisfied to the extent of \$3359 65, by a sale and transfer, from the husband to the wife, of all the effects, goods, wares and merchandise, furniture and fixtures, contained in a house and store on New Levee street, No. 82.

Several years after this period, *Joseph Hernsheim*, the husband, removed to Roma, in Texas, his wife remaining in New Orleans. It is shown that he was then extensively engaged in commerce when he died, in April, 1849, leaving a large property in Texas, but at the same time owing debts to a considerable amount. The defendant, his widow, qualified as administratrix upon his estate in Louisiana, which was small, and another person qualified as administrator in Texas.

Amongst the creditors who were pressing for their money, both in this city and in Texas, was *Goldsmith, Haber & Co.*, who had a claim against the deceased for \$6600. The administrator in Texas came to New Orleans, and, with the assistance of the plaintiff, *Gunst*, and the defendant, effected a compromise of this debt, for \$4000. The plaintiff advanced, for defendant, the money that was necessary; and, to secure the repayment of which, she executed the three several notes before mentioned, payable to the order of *Aaron Frank*, who endorsed and delivered them to the plaintiff.

*Frank*, upon being examined as a witness, states, that *Mrs. Hernsheim* took him herself to the notary to sign the act of mortgage; that he endorsed the notes, and, by her order, delivered them to *Gunst*. It appears from other testimony, that the defendant admitted, that the money to effect this settlement had been advanced to her by *Gunst*; that she had given to him her three notes, secured

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by mortgage, to indemnify him, and that she owed \$1160 on the remaining note, the balance now claimed by plaintiff.

We can see nothing improper or unlawful in this transaction, either on the part of the plaintiff or the defendant, except the defence she now makes to this suit. It is true, she may not have been legally bound to pay the debts of her deceased husband; but, if she desired to do so, and borrowed money for that purpose, she is bound, as well in law as in morality, for its repayment. Art. 2412 of the Civil Code, prohibits the wife from becoming the surety of her husband whilst living; but there is no law that prohibits her from the payment of his debts after his death, if she thinks proper.

It is, moreover, proved in this case, that the defendant has received very considerable sums of money from the succession of her husband, both in Texas and Louisiana. We do not, however, consider this material, except so far as the expectation of the receipt of these funds may have influenced her in assuming the responsibility of discharging her husband's debts, and is a strong circumstance, in connection with others, to show that no imposition or fraud has been practiced upon her by the plaintiff, as she now alleges. We cannot agree with the district judge in his opinion that the defendant is an ignorant woman, who has been imposed upon. We think it more probable from the evidence, that the sudden change in her disposition to pay the debts of her deceased husband, has been owing more to the circumstance of her having taken a new spouse, than to her ignorance.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be reversed, and that there be judgment against the defendant, *Rika Brull*, in favor of the plaintiff, for \$1160, with eight per cent interest from the 2d of September, 1851, and that his mortgage be recognized as prayed for in his petition, with costs in both courts.

### SARAH ANN H. ALLEN v. GEORGE LANDRETH et al.

Where the order of appeal was granted on the petition of a married woman, unauthorized by her husband or the court, and where she and her surety signed the appeal bond without her husband's authorization, the appeal will be dismissed.

**A**PPEAL from the District Court of the Parish of Jefferson, *Clarke, J. Wolfe and Singleton*, for plaintiff. *McCay*, for defendant.

This suit was commenced by injunction, and the wife was duly authorized by her husband to institute it. By the court:

DUNBAR, J. A motion to dismiss this appeal has been filed, upon the ground that the plaintiff and appellant, a married woman, has not been authorized by her husband, or the court, to take an appeal.

It appears, that the order of appeal has been granted in this case upon the petition of a married woman, without the authority of her husband, or the court, as is stated in the above motion, and we further find, that she and her surety executed the appeal bond without any authorization from the husband. The appeal must therefore be dismissed. Code of Practice, art. 106, 107. *German v. Berghans*, 1 R. R. 230. *Same v. Same*, 2 R. R. 282. *Curry v. Dudley*, 6 R. R. 77. *Bray v. Bynam*, 2 Ann. 879.

Appeal dismissed.



## THE CITY OF NEW ORLEANS v. MILLER.

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The evil to be suppressed by the act of 19th March, 1835, entitled an act to prevent gambling, was the gaming house with its capital, always ready for play. Whether the capital, or stake, is owned or furnished by the house, or made up at the time by the players, the offence is the same. *Held*: Therefore, that the game of Keno is within the statute of 1835. The municipal authority of the city, has no power to impose a penalty on that which the law of the State has made punishable as an offence.

**A** PPEAL from the first Justice of the Peace for the Parish of New Orleans, D. Byrne, Justice.

E. T. Parker and M. A. Foute, for plaintiff. "The case of *Municipality No. One v. Wilson*, 5 Ann. 747, is fully applicable to this offence; it comes within that class of nuisances against the public order, not included in the statute, which it is the duty of the city to suppress, and for which the power has been delegated by the Legislature."

**C.** Roselius, for defendant. By the court:

EUSTIS, C. J. This suit is instituted for the recovery of a penalty of one hundred dollars, for the violation of an ordinance of the late General Council of New Orleans, passed on the 19th November, 1846. The appeal is taken by the city, from the decision of one of the magistrates of New Orleans. He decided, that the ordinance under which the penalty was claimed, was null and void; that the act for which it was sought to be enforced, was an offence under the penal laws of the State, and that the municipal power of the city had no authority to impose a penalty on that, which the law of the State had made punishable as an offence.

The ordinance provides, that it shall not be lawful to keep within the limits of the city, the game, or games, called keno, or lotto, or any other gambling games of hazard, or to allow such game, or games, to be played on any occupied premises, under a penalty of one hundred dollars.

It is evident from the other parts of this ordinance, and from the construction which it has always received, that the effect of the ordinance was to be the suppression of gaming in this form, or of playing the games mentioned, for money.

Our impression is, that the offence of keeping the game of keno, is punishable under the act of March 19th, 1835, entitled an act to prevent gambling. That act evidently purports to prohibit and punish the keeping of gaming houses. The terms used in it of banking house, or banking games, present no difficulty whatever as to its meaning. The evil to be suppressed, was the gaming house, with its capital, always ready for play. Whether the capital, or stake, is owned, or furnished by the house, or made up at the time by the players, the evil is the same, and the offence is the same.

This game of keno we understand to be of the latter description; it is consequently within the statute of 1835.

The judgment of the court below is therefore affirmed, with costs.

## F. M. FISK v. ABRAM HABER.

Where a person owned adjoining lots, and made doors and windows in the wall which divided them, a purchaser of one of the lots, at the succession sale, cannot claim the door and window openings as a right of servitude. The purchaser acquired the wall, in common, and the previous destination *du pere de famille*, resulting from the openings, was abrogated by the sale.

The servitude of passage claimed, is not a continuous servitude, and could, under no circumstances, result from the destination of the *pere de famille*.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan. J. Bartlette*, for plaintiff. Article 765. "If the proprietor of two estates, between which there exist an apparent sign of servitude, sell one of those estates, and if the deed of sale be silent respecting the servitude, the same shall continue to exist, actively or passively in favor or upon the estate which has been sold."

This law seems to be too clear and positive to admit of doubt or argument. It applies directly to the case before the court. The reasons given by the court below for its judgment in favor of the defendant, do not touch it. But in addition to these provisions of the code, which seem too clear to require support or interpretation, there are decisions of this court which are applicable to the case at bar, and strengthen the position we assume. See the case of *Alexander v. Boghel*, 4 L. R. 312. *Barton v. Kirkman*, 5 R. R. 16. *Durell v. Boisblanc et al.*, 1 Ann. 407. This last case was precisely similar to the present one in all the important facts. The sale of both lots was made at the same time, and was silent with regard to the servitude. The court held that it continued to exist.

*Ducros, Jr.*, for defendant. It is manifest, from the report of the tribune Albisson, (motifs and discours du Code Civil, vol. 1, page 327); *Marcadé*, vol. 2, p. 690; *Zucharine*, vol. 2, p. 87, and from the decision of the Royal Court of Lyon, of the 11th of June, 1831, that article 765 of the Louisiana Code, which is a literal transcript from art. 694, C. N., does not relate to the destination of the *pater-familias*.

By the court:

**ROST, J.** The servitudes claimed by the appellant, are to be exercised through doors and windows in a wall standing on the division line between his lot and that of the defendant. Every such wall is presumed to be in common, if there be no proof to the contrary. C. C. 673. For want of any such proof in this case, we must assume that, at the probate sale of those two lots, made in the succession of *Joseph Tabony*, who in his life time owned both, the purchasers acquired this wall in common, and under that state of facts, the previous destination *du pere de famille* resulting from the openings *Tabony* had made in the wall, was abrogated by the sale of an undivided half of it to the defendant, and the case is to be determined under article 681 of the Code.

Under the express provision of that article, the defendant might have compelled the plaintiff to close all the openings in the common wall, and rested his buildings upon it; but it was optional with him so to do, or to give up the right of common, and erect a new wall as he has done. The plaintiff has no cause of action against him. See *Cuelin v. Renaud*, 19 Sirey, 2d part, 277. It may be observed that the servitude of passage claimed, is not a continuous servitude, and could, under no circumstances, result from the destination of the *pere de famille*.

Judgment affirmed with costs.

## DIGGS, MCKEEVER &amp; CO. v. S. G. STAPLES.

A party who seeks to make another liable for the debt of a third person, must prove such liability with reasonable certainty, or he cannot recover.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Kelly, and Spring and Halsey*, for plaintiffs. *Elmore and King*, for defendant. By the court:

**DUNBAR, J.** This suit is brought to recover the amount of a bill for groceries, sold by plaintiffs to *T. B. Staples*, defendant's brother, the articles being furnished for a sawmill situated on Wolfe River, near the Bayou of St. Louis, in the State of Mississippi.

The defendant, *Solomon G. Staples*, is sought to be made liable, on the ground of an implied promise on his part, to pay for the goods sold.

The district judge thought the evidence sufficient, and gave a judgment for the plaintiff for the sum demanded, from which the defendant has appealed.

The only witness to sustain this implied promise of the defendant, is the clerk of the plaintiff, who says: "The goods were sold to *T. B. Staples*; he gave the order for the goods; he told me he would pay for the goods by an order on *Tillerton*; he gave me the mark for the goods, '*T. B. Staples*.' *T. B. Staples* bought on the first occasion for cash, and on the second bill witness refused to sell to him, as he had not paid for the first. *T. B. Staples* then said he would give him an order on *Tillerton*, who owed him." The witness further says, "that he would not have given him the second bill of goods, unless he had given the order on *Tillerton*, or some other security equally as good. The order on *Tillerton* was to have been the consideration of the sale that was made on the 23d of January, 1850."

The bill of this date is for \$515 27, being the principal part of the account sued on, the whole amount being \$672 57, exclusive of interest. The same witness testifies, "that the defendant had been in the habit of purchasing supplies from plaintiffs, for his sawmill; that he came to the store of plaintiffs, and said, that he had sold out the mill to his brothers, and told the plaintiffs 'to let them have what they wanted.' Defendant did not make a direct promise to pay the debt of his brothers; but witness considered the defendant's introduction, 'to let his brothers have what they wanted,' was an obligation on his part to pay. Witness would not have delivered the goods, had not defendant introduced his brother to him."

There appears to be a manifest discrepancy in this testimony. The witness tells us first, that he would not have let *T. B. Staples*, the brother of the defendant, have the second bill of goods, for \$515 27, but for the promised order on *Tillerton*, or some surety equally as good; and, afterwards, he tells us that he would not have sold them to him, but for the request of the defendant to let his brothers have what they wanted.

This evidence seems to us too uncertain to raise an implied promise on the part of the defendant, to pay for the goods sold to his brothers. There is no pretence to say, that there was an express promise to pay. Had the plaintiff or his clerk required it, it is very probable the defendant would have assumed pay-

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ment for the goods without hesitation; if so, the goods being sold at his special instance and request, there would have been a sufficient consideration for an express promise. It is impossible, with any certainty, to tell what may have been the inducement of the plaintiff. In the case of *Boyd v. Sappington*, Watts' Reports, 4th vol., p. 247, the Supreme Court of Pennsylvania decided, "that a request, by a father, to a physician, to attend his son, then of full age, and sick at the father's house, raises no implied promise on the part of the father to pay for the services rendered."

A party who seeks to make another liable for the debt of a third person, must prove such liability with reasonable certainty, or he cannot recover. This principle has been repeatedly recognized by this court.

Taking this view of the case, we do not consider it material to examine into the question, whether there are any corroborating circumstances to support the testimony of this single witness, as required by the 2257 article of the Civil Code, where the matter in dispute exceeds five hundred dollars.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be reversed, and that there be judgment for the defendant, as in case of nonsuit, with costs in both courts.

### BLANCHARD v. DAVIDSON.

Where the claim for rent is based upon the mere occupancy of the defendant, without proof that this occupancy was as lessee, or sub-lessee, a provisional seizure cannot be sustained.

**A**PPEAL from the District Court of the Parish of Jefferson, *Clarke, J. Michel*, for plaintiff. *Gainnie and Haynes*, for defendant. By the court:

**SLIDELL, J.** The petition, which is vague and obscure, does not allege a relation of lessor and lessee between the plaintiff and the defendant, nor any such state of facts as would create the lessor's privilege upon the movables belonging to *Davidson*, and existing on the property described in the petition. See *Fisk v. Morris*, 11 R. R. 280.

In the absence of a privilege there was no foundation for the writ of provisional seizure.

If the plaintiff was not entitled to a provisional seizure, his claim to sue *Davidson*, in this action in the parish of Jefferson also fails, the defendant being a resident of New Orleans.

It is to be observed, that our remarks are confined to the claim presented in the petition, which is merely for a personal judgment for a sum of money, with the privilege of lessor, without any distinct, intelligible averments, showing that *Davidson* occupied the premises as lessee or sub-lessee during the time for which rent is claimed.

From the evidence taken at the trial, it seems that the claim for compensation for the use of the premises, is based upon the defendant's mere occupancy of the premises. See the case of *Fisk v. Morris*, above cited. We are therefore of opinion, that the defendant's exception and motion to set aside the provisional seizure, should have been sustained. See C. C. 2675, 2676, 2639, 2640. C. P. 287.

It is therefore decreed, that the judgment of the district court be reversed, the provisional seizure be set aside, and the petition be dismissed, as in case of nonsuit, the plaintiff to pay costs in both courts.

## ADAM FREDERICK v. ETIENNE BRULARD,

A surveyor ordered to trace a line under a former survey, is bound to follow it, without regard to the title papers, or the variations of the compass.

**A** PPEAL from the District Court of the parish of Plaquemine, *Rosseau, J. Lombard*, for plaintiff. *Foulhouse*, for defendant. By the court :

Rost, J. This was originally an action of bornage. This court determined, that the true boundary between the land of the plaintiff and that of the defendant, was the division line represented on a plat of survey of those lands made by Barthelemy Lafon, on the 15th April, 1806; and, as it did not appear from the evidence, that the marks showing the position and course of that line were still visible, the case was remanded for the purpose of having that line traced, and of putting the parties in possession under it.

When the case returned to the district court, the surveyor general, on the motion of the plaintiff's counsel, was ordered to establish said line in conformity with the decree of this court. In obedience to this order, the boundary line was established by the deputy surveyor, Harrison, as running N. 18 deg. E. at the time; and he returned the plat of survey into court, together with the *proces verbal* of his field operations. The plaintiff then took the following rule: "On motion of *Lewis Lombard, Esq.*, of counsel for plaintiff, and on giving the court to understand and be informed that M. Harrison, deputy surveyor of Lewis Brinquier, Surveyor General of the State of Louisiana, had, on the 22d of January, 1852, filed a plat of survey and a *proces verbal* of his operation in establishing the line of division between *Brulard* and *Frederick's* estates; that on said plat, he represents the line North, sixteen degrees East, in 1851, in red, and the line North, eighteen degrees East, in 1851, by a black line, and represents said line to be the line in dispute, and reports it to be such.

It is ordered by the court, that *Etienne Brulard*, the defendant, do show cause, on Saturday, the 31st day of January, 1852, why the red line above described, should not be established as the one described by Barthelemy Lafon, in the plat of the 15th April, 1806, as dividing the estates of *Etienne Brulard* and *Adam Frederick*.

The answer to this rule was, that it assigns no error in the survey, and sets forth no grounds or reasons for setting aside or altering the report of the surveyor. It contains also a prayer, that the report be homologated and the parties put in possession under it.

The defendant prevailed, and the plaintiff has appealed.

A great many objections have been raised in argument, which, it is manifest under the pleading, we cannot notice. The rule taken by the plaintiff, assumes the capacity of the deputy surveyor, and that the survey was regularly made and returned into court; and merely suggests that the red, and not the black line on the plat, is the true line of division. No evidence whatever has been adduced in support of that position, but the plaintiff's counsel has attempted to prove it by astronomical calculations. And it may be conceded, that he has shown, that the surveyor did not remain on the spot a sufficient time to ascertain the exact variation of the compass there, on the day he went. This, however, is of very little consequence. He states, that he proceeded in the survey

**FREDERICK v. BRULARD.** with the assistance of A. D. Hémécourt, another practical surveyor; that after careful search, they discovered the bornes planted by Lafon, on the division line, in 1806; and that he conformed to them in making the survey.

There is nothing in the record to disprove the declaration of the surveyor, that the landmarks found by him were those of Lafon's survey; and the fact is not even put at issue. It must, therefore, be assumed to be true. And it is clear, that, the old division line having been found, the surveyor was bound to follow it without regard to the title papers, or the variation of the compass. *Zéniage v. Harang*, 17 L. R. 349.

Whether the surveyor gave satisfactory reasons for the difference between the present bearing of the line, and that indicated by the plan of Lafon, is quite immaterial. The guidance of the stars is not resorted to, when the path to be followed is visible on the earth.

Judgment affirmed, with costs.

### STILLMAN v. WATERMAN.

The admission in the answer, that services were rendered, is not an admission of their value.

**APPEAL** from the Third District Court of New Orleans. *Kennedy, J. Stocton and Steele*, for plaintiff. *E. H. Durell*, for defendant. By the court:

**SLIDELL, J.** We think the district judge did not err in telling the jury, that the defendant's answer admitted the rendition of the services alleged in the petition, but not their value.

The only remaining question in the case is, whether the amount paid by the defendant is a sufficient compensation for the services rendered to him by the plaintiff. The sum awarded by the jury seems to us low; but we are not prepared to say, that the verdict is so manifestly erroneous, as to authorize reversal.

Judgment affirmed, with costs.

### F. PILLOT, wife of J. BARISIEM, v. T. M. COOPER, Curator.

A person whose property has been sold without his consent, may appeal from a decision affecting the property, although no party to the suit, under art. C. P. 571.

**APPEAL** from the Third District Court of the Parish of Jefferson, *Clerk, J. Charles Fitz*, for *C. Fraisse*, appellant. *J. J. Michel*, for plaintiff. By the court:

**ROST, J.** The defendant, as curator of the succession of *Yorick Privat*, is in the possession of the steamer *Daniel Boon*, which was the joint property of *Privat* and *César Fraisse*. The plaintiff claimed the boat from him under a sale to her, by *Privat* acting for himself and as agent of *Fraisse*.

\*Plaintiff, in effect, requested the court to instruct the jury, that as the plaintiff alleged the services to be worth \$500, and as it was not denied, it must be considered as admitted that the services were worth that sum. The court refused; and instructed the jury, that "the defendant admitted the services, but not their value."

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The answer contains a general denial, and an averment that the sale alleged is a forgery, or was otherwise obtained by fraud.

The signature of *Privat*, to the act of sale, was proved, by a comparison of handwriting with a signature in a notarial act, which is not in the record, and upon that evidence there was judgment in favor of the plaintiff, for the steamer.

*Fraise* took a suspensive appeal, on the ground that he is aggrieved by the judgment; and alleges, as errors, that under the defence, the signature of *Privat* is not sufficiently proved; that there is no evidence of the authority of *Privat* to sell his half interest in the boat; that he never gave such authority, and that the judgment, if executed, would work him an irreparable injury.

The appellant lives in Vicksburg. There is nothing to show that he had notice of this suit; and it is true, as he alleges, that the record contains no evidence of the authority of *Privat* to sell.

It would seem, on the contrary, that *Privat* continued to have the control of the boat, after the alleged sale.

We think this a proper case for the application of article 571 of the Code of Practice, and that the ends of justice will be promoted by reversing the judgment, so far as appealed from, and remanding the case, to be tried between the appellant and the plaintiff.

It is ordered that the judgment, so far as appealed from, be reversed, and the case remanded for further proceedings between the appellant and the plaintiff, who is adjudged to pay the costs of the appeal.

### JOSEPH A. WILDER v. ELIAS BRUSH.

An arrest will lie for damages for any injury sustained by the plaintiff, either in his person or property.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Marr and Roberts*, for plaintiff. *L. E. Simonds*, for defendant. By the court:

**DUNBAR, J.** This is a suit brought against the defendant, a citizen of this State, to recover damages for false imprisonment. The plaintiff in this case commenced his action by an arrest of the defendant, who took a rule upon him to set aside the arrest, upon the ground that the demand of the plaintiff is *ex delicto* or for damages for an injury to his person and reputation; and that the law does not permit an arrest in such an action for damages.

The district judge made the rule absolute, and discharged the defendant from arrest; from which judgment the plaintiff has appealed.

The Code of Practice, article 214, provides, that "such arrest may be ordered in all demands brought for a debt, whether liquidated or not, when the term of payment has expired, and even for damages for any injury sustained by the plaintiff, either in his person or property."

It is true that it has been often held by this court, that there could not be an attachment for such a cause of action; but there is a manifest difference in the above article of the Code of Practice and article 242 of the same Code, which declares, that "the property of a debtor may be attached in the hands of third persons, by his creditors, in order to secure the payment of a debt, whatever

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may be its nature, whether the amount be liquidated or not, provided the term of payment has arrived." The latter is limited to debts, and by the interpretation of this court, is extended only to all actions arising *ex contractu*, but no further; the former, article 213, extends even to any damages for any injuries sustained by the plaintiff, either in his person or property.

Why our Legislature should have thought proper thus to guard more securely the rights of property than of person, it is not for us to determine. We find the law thus written, and have no power to change it. "When a law is clear and free from all ambiguity, the letter of it is not to be disregarded, under the pretext of pursuing its spirit. Civil Code, art. 13. The distinction between odious laws and laws entitled to favor, with a view of narrowing or extending their construction, cannot be made by those whose duty it is to interpret them." Civil Code, art. 20.

It is therefore ordered, that the judgment of the district court be reversed, and the rule to set aside the arrest discharged, and this case remanded for further proceedings according to law. The costs of this appeal to be paid by the defendant.



## SUPPLEMENT.

The following cases were decided in December, 1851, and January and February, 1852, and from the circumstance that they were not reported by my predecessor, it is presumed that the action of the court had not become final at the time that he ceased to report. R.

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### JOHN BLAFFER v. P. HERMAN.

Where the conduct of the first endorser of a note, was calculated and intended to induce the notary's clerk to make no further attempt to find the maker, and present the note for payment, and where he undertakes himself to have the money forthcoming, in an action against him, he cannot relieve himself from liability, on the ground that no presentment for payment was made on the maker.

**A** PPEAL from the Fifth District Court of New Orleans. *Buchanan, J. C. Roselius*, for plaintiff. *F. Haynes*, for defendant. By the court :

**SLIDELL, J.** The defendant is sued as the endorser of a promissory note, made by *Helwig*. He resists the claim on the ground, that no demand was made of the maker. The note is dated in New Orleans ; but the maker resided in the adjoining town, Lafayette. No demand of payment was made of the maker. The protest, which was made by a New Orleans notary, at the request of the bank in which the plaintiff had lodged it for collection, states, that he made diligent inquiry for the drawer on the note, in order to demand payment thereof, particularly of the first endorser, who informed him, that the maker resided in the adjoining parish of Jefferson ; the said endorser promising, that said note would be paid the next morning.

The notary's clerk was examined at the trial, and testified, that he exhibited the note to the endorser, in the afternoon of the day of its maturity, who told him the maker lived in the parish of Jefferson, and also told him not to protest the note, and that he would go and see the maker, and settle the note the next morning. The testimony of the notary's clerk is corroborated by another witness, who said, that two or three days after the note fell due, the defendant told him that the notary had called upon him with the note, and that he told the notary, he would go and see the maker, and get him to pay it ; and that he did go to the maker for that purpose, and was very much surprised to find that he had not the money to pay the note.

It is obvious, that this course of conduct on the part of the endorser, was calculated, and was intended to induce the notary's clerk to make no further attempts to find the maker, and present the note for payment. And in this connection, we may observe, that there is little weight in the argument drawn,

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from the fact, that the notary's official sphere of action was limited to the parish of Orleans; for he or his clerk, in their individual capacities, were competent to make a presentment out of the parish. This could have been accomplished in a half hour's walk to the neighboring towns; or, upon notifying the bank, it could have sent a messenger there in season. Although it is usual to employ notaries to protest notes, it is not necessary to do so.

The general rule of the commercial law is undisputed. The endorser is liable, after due diligence by the holder, to obtain payment of the maker, and I notice that payment has not been made. These being conditions implied in the contract of endorsement, his liability depends upon their fulfillment. But, although such is the general rule, it is equally clear that he may waive, or modify privileges, which the law implies for his benefit. And when he so acts, as to manifest his willingness to waive them, and the holder may be fairly considered as having regulated his conduct accordingly, and as having abstained from doing what otherwise he might have done for his own protection, it would operate as a fraud upon the holder, if the endorser were afterwards permitted to avail himself of the omission.

In the present case, the defendant must be considered as having invited the holder to desist from further search for the maker, and to have undertaken to see the maker himself, and have the money forthcoming. *Quoties per eum, cujus interest conditionem non impleri, fiat quominus implea ut, perinde haberi ac si conditio impleta fuisset.* Leg. 161, ff. de regulis juris. Civil Code, 2035. *Lincoln and Kennebeck Bank v. Page*, 9 Mass. 157. *Barker v. Parker*, 6 Pick. 82. *Boyd v. Cleveland*, 4 Pick. 524. Story on notes, §271.

The notarial fees of protest which the plaintiff claims, cannot be allowed. The notary may have thought it proper to spread upon his notarial record what had been done, in order to preserve for his employer authentic and permanent evidence under the statute. But to charge the defendant with the expense of doing so, would be in violation of the understanding between him and the notary.

It is therefore decreed, that the judgment of the district court be reversed; and that the plaintiff receive from the defendant the sum of \$550, with interest at the rate of eight per cent per annum, from the 26th March, 1851, until paid, and costs in both courts; but without costs of protest.

### WIDOW DUFRESNE v. M. HAYDEL.

The husband of the plaintiff, having 155 80-100th acres in his front tract, paid into the hands of the receiver of public monies, \$145 75, for a certificate of the entry of 119 acres of the lands in his rear. *Nicholas Haydel*, under whom the defendant holds, owned a front tract containing 249 54-100th acres, and paid into the hands of the receiver of public monies, the price of 248 acres, for his entry of the back lands. The whole quantity of land in the rear, subject to their entries, was 322 48-100th acres. Of this quantity, a surveyor of the United States allotted to *Haydel* 243 20-100th acres, and *Dufresne* 79 28-100th. His survey was approved, March, 1831, by the surveyor of public lands, and a patent was issued to *Haydel* for 243 20-100th acres of the land, in 1845. The plaintiff claimed that the land should have been divided, proportionably to the quantity in the front tracts, and brought suit to obtain that division. Her action was sustained. *Held*: The authority given, by the act of Congress, to the surveyor, to make an equitable division of the land between the claimants, is in affirmance of the act authorizing each [front proprietor] to purchase an equitable proportion of the land, [in his rear,] and neither adds any thing to, nor takes any

thing from, the rights of the parties; he is a ministerial officer, bound to perform this duty, not as he may choose, but equitably; and if he does not, the injured party may resort to a court of justice, or there would be a right without a remedy, in derogation of the first article of our Code of Practice.

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The act of Congress expressly entitles the plaintiff to an equitable division of the back lands with the only proprietor whose claim came in conflict with hers.

In the sale of the public lands, the government and its purchasers must be governed by the same principles which apply to individual vendors and vendees.

When a patent issues, it irrevocably divests the government of title, in favor of the patentee; but if the land already belongs to an individual, either by sale or legal confirmation, the subsequent issue of a patent to another person, inures to the benefit of the true owner.

**A** PPEAL from the District Court of the Parish of St. Jean Baptiste, *Duffel, J. St. Paul*, for plaintiff. *Louis Janin*, for defendant. By the court: (*Eustis, C. J.*, absent.)

**PRESTON, J.** The plaintiff and defendant are respectively proprietors of tracts of land, fronting the Mississippi river, immediately above and below a point on the river, or convex bend, which were confirmed to them.

Congress, by the 5th section of an Act, approved the 15th of February, 1811, provided, "That every person who, either by virtue of a French or Spanish grant, recognized by the laws of the United States, or under a claim confirmed by the commissioners appointed for the purpose of ascertaining the rights of persons claiming lands in the Territory of Orleans, owns a tract bordering on any river, creek, bayou, or water course, in the said Territory, and not exceeding in depth forty arpents, French measure, shall be entitled to a preference in becoming the purchaser of any vacant tract of land adjacent to and back of his own tract, at the same price and on the same terms and conditions as is or may be provided by law for the public lands in said Territory. And the principal deputy surveyor of each district, respectively, shall be and he is hereby authorized, under the superintendence of the surveyor of the public lands south of the State of Tennessee, to cause to be surveyed the tracts claimed by virtue of this section. And in all cases where, by reason of bends in the river, lake, creek, bayou, or water course, bordering on the tract, and of adjacent claims of a similar nature, each claimant cannot obtain a tract equal in quantity to the adjacent tract already owned by him, to divide the vacant land applicable to that object between the several claimants, in such a manner as to him may appear most equitable." 1 Land Laws, 588.

This provision of law was revived and reenacted by the 7th section of an Act, approved the 11th of May, 1820. 1 Land Laws, 779.

Those, under whom the plaintiff and defendant hold their lands respectively, availed themselves of the preëmption accorded by this law. The husband of the plaintiff, having 155 80-100th acres in his front tract, paid into the hands of the receiver of public monies \$148 75, for a certificate of the entry of 119 acres of the lands in his rear. *Nicholas Haydel*, under whom the defendant holds, owned a front tract containing 249 54-100th acres, and paid into the hands of the receiver of public monies, the price of 248 acres, for his entry of the back lands under the law.

The whole quantity of land in the rear subject to their entries was 322 48-100th acres, as to which there was no conflict between them and any other proprietors. Of this quantity, a surveyor of the United States allotted to *Haydel* 243 24-100th acres, and to *Dufresne* 78 28-100ths. His survey was approved, in March, 1831, by the surveyor of public lands south of Tennessee river, and a patent was issued to *Haydel* for 243 20-100th acres of the land, in 1845.

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If the land subject to the entries had been divided between the claimants proportionably to the quantity contained respectively in their front tracts, *Haydel* would have received 201 acres, and *Dufresne* 121 acres. *Mrs. Dufresne* claims that the land should have been divided proportionably to the quantity in the front tracts, and brings this suit to obtain that division.

The Act of Congress was the foundation of the title to the lands, and fixed as exact rule by which the quantities to be sold to the respective parties was to be ascertained. An equitable division, in case of deficiency in quantity for each, is a ratable division in proportion to the quantities in the front tracts, unless something prevents it. The original instructions of Mr. Gallatin, the Secretary of the Treasury, for the execution of the Act of 1811, indicated this rule to the surveyor and the commissioners of the general land office, by a letter of the 14th of July, 1845, laid it down as an arithmetical rule to govern such cases.

The surveyor was to measure the land for each purchaser, and run the line of division between them.

It was a ministerial duty. There could, in this case, be but one equitable line: that which would give the plaintiff 121 acres and to the defendant 201 acres. A fixed rule was given to ascertain the quantity of each, and any deviation from it, was in violation of the Act of Congress, and gave no rights to the defendant, and could take away none from the plaintiff.

The Act of Congress thus expressly entitled the plaintiff to an equitable division of the back lands, with the only proprietor whose claim came in conflict with hers. An extraordinary position of the tracts might possibly render a proportional division inequitable. But, in this case, there is no pretence, much less reason, offered for not having made a proportionable division. By the bare inspection of the map, it will be seen that the surveyor might, by extending the side lines of each proprietor's front tract, have given each about his proportion of the back lands. That this should have been done, when possible, we have no doubt, was the intention of Congress.

By an inspection of the map, it is palpable that not an equitable, or even discretionary, division of the land, was made between the two claimants. The surveyor simply took from one party forty acres of land, which he had purchased from the government, and for which he had paid, and for which he had the best possible title, by an Act of Congress, and gave it to another man who had no title whatever to it but the will of the surveyor. This was a most inequitable proceeding, directly in conflict with the Act of Congress, and cannot be recognized by a court of justice.

It is said, however, that the disposition of the public lands is in the power of Congress under the direction of their officers, and that they have given a patent to the defendant for the lands in controversy, which is a complete divestiture of the title of the United States in favor of the defendant.

In the sale of the public lands, the government and its purchasers must be governed by the same principles which apply to individual vendors and vendees. 9 Peters, 760. Vattel's Law of Nations, book 1, ch. 17, § 199; ch. 23, § 295; book 2, ch. 7, § 83; ch. 1, § 14.

Now the government, by the entry of the register of the land office, and the receipt of the purchase money by the receiver of public monies, sold a tract of land to the vendee, containing 119 acres, if such quantity could be obtained, in the rear of his front, without infringing upon the rights of another person purchasing a tract in his rear under the same law, and upon the same terms and

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conditions. There were two acres more than that quantity, without, in any manner, conflicting with the rights of the other vendee.

Could an ordinary vendor, having made such a sale, afterwards take forty acres of the land, so sold, and give it to his other vendee? His deed to that effect would have no effect. So neither can the patent issued by the United States, under similar circumstances, have that effect.

As vendors of land, perhaps, the government could not, for their own exclusive interest, succeed in annulling a patent, unless in those cases of error, or fraud, for which an ordinary vendor could annul his deed. But latterly it has been held by the Supreme Court of the United States, that they would disregard patents obtained contrary to law, in cases where individuals had previously acquired under the government an adverse title. In the case of the *United States v. Hughes*, that tribunal, at its last term, disregarded and annulled a patent, the United States suing for an individual, to whom they had first legally sold the land. So in the case of *Marsh v. Brooks*, and *Menard v. Massey*, 8 Howard, 233 and 293.

We have examined the case of *Pepper et als. v. Dunlop*, 9 R. R. 287, cited by the defendant's counsel, and find nothing decided in it adverse to these principles; nor in the opinion of the Attorney General Butler, 2 vol. Laws and Opinions, &c., relating to public lands, p. 213. The case of *Bagnell et als. v. Broderick*, principally relied upon by the counsel, was decided upon the technical distinction between law and equity, and between a legal and equitable title, which does not exist in this State. And, even in that case, the dissenting opinion of Justice McLean appears to us conclusive against the correctness of the decision, in which the majority of the court were unable to give relief against the grossest possible fraud, and that palpable on the face of the record.

The true principle is this: that the government is, in reality, the owner of the land. When the patent issues, it irrevocably divests the government of title, in favor of the patentee; but if the land already belongs to an individual, either by sale or legal confirmation, the subsequent issue of a patent to another person, inures to the benefit of the true owner.

In this case the Act of Congress was the authority to the register and receiver to sell the land in controversy to the plaintiff, by preëmption, in consideration of his being the proprietor of the front tract. His entry of the quantity to which he was entitled under the Act, and payment of the price, was the purchase from the government. This sale divested the title of the United States, and vested it in the plaintiff. Of the quantity, which he was entitled by the Act to purchase, he never can be divested by the government, which cannot sell a second time, nor retake that which has been lawfully sold; nor by an adverse claimant by virtue of a concurrent or subsequent purchase.

The authority given by the Act of Congress to the surveyor, to make an equitable division of the land between the claimants, is in affirmance of the Act authorizing each to purchase an equitable proportion of the land, and neither adds any thing to, nor takes any thing from, the rights of the parties. He is a ministerial officer, bound to perform this duty, not as he may choose, but equitably; and if he does not, the injured party may resort to a court for justice, or there would be a right without a remedy, in derogation of the first article of our Code of Practice.

It is true, Congress has confided much to the judgment of the surveyor, by directing him to divide the land in such manner as to him may appear equitable.

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And, if we had reason to believe that he readily exercised his best judgment, or had even performed the duty in the presence of the parties, or having notified them to be present, so as to have afforded the injured party an opportunity of seeking redress from the higher officers of the government, we should be induced only by a palpable violation of equity to reverse the discretion confided to him. But in the present case it does not appear that the parties interested in the survey, were present, or notified of the time it was to take place; and it is manifest that the surveyor did not attempt to make an equitable division between them. Such being the case, it was at least incumbent on the defendant to suggest or show some reason for his taking the forty acres of the plaintiff's land, and in default of his so doing, a court is bound to presume that the surveyor acted *ex parte*, and under the unjust influence of him who claims more than his share of the land, without reason, or even pretext, to justify it.

Both patents and surveys are so constantly made *ex parte*, and often without sufficient information by the ministerial officers of the general government, that they cannot be conclusive upon adverse claimants, and must necessarily be subject to judicial investigation and decision, when manifestly made in violation of Acts of Congress and private right.

The prescriptions of ten, twenty and thirty years, are plead. It is not clearly established by the evidence, that the plaintiff cannot obtain the quantity of land to which he is actually entitled, without taking any part of that which is actually possessed by the defendant, or by others for him. Even if it be absolutely necessary to do so, this is strictly and in good faith an action to settle boundaries which are imprescriptible. Code, art. 821.

For these reasons, the judgment of the district court is reversed; and it is adjudged and decreed, that a line be run by a surveyor, appointed by the district court, so as to give the plaintiff the quantity of one hundred and nineteen acres of the lands in the rear of his front tract; and that the defendant be condemned to pay the costs of the appeal; the costs of the district court, and the expense of the survey, to be borne equally by the parties; and the case is remanded to the district court, to direct the survey and make the division.

SLIDELL, J., dissenting.

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### W. C. GOODRICH v. ASA PATTINGILL et al.

The plaintiff obtained an attachment against the defendant, but the sheriff did not take actual possession of the property under the writ, and no act of possession by him or his successors is shown, for five years after its return. About five years after that time, the attaching creditor had a curator *ad hoc* appointed to defendant, obtained judgment, and seized the lots under an execution. In the meantime, and within two years from the date of the attachment, defendant sold the property, and it passed into the hands of purchasers who were ignorant of the attachment. *Held*: The law required that the sheriff should have seized and detained the property; that he and his successors should have taken charge and kept possession of it; and for the failure of Goodrich, the attaching creditor, to have seen this done, and to have prosecuted his suit with diligence, innocent purchasers of the property should not suffer.

Sheriffs must seize actually, and not fictitiously, where the law requires; and third persons must not suffer by their neglect to do so.

**A** PPEAL from the Third District Court of the Parish of Jefferson, *Clarke, J. Goodrich*  
*Dunlap and Clarke*, for plaintiff. *Ogden and Duncan*, for defendants. *PETTINGALE*.

By the court:

PRESTON, J. The evidence satisfies us that the sheriff did not, on the 6th of December, 1836, take actual possession of the lots in controversy, by virtue of *Goodrich's* attachment. He had seized, and was about to sell them on that day, in the suit of *Kohn v. Pettingale*. He returned the writ of attachment on the same day that he had seized the lots under it. No act of possession by him or his successors in office is shown, for five years afterwards. No steps were even taken in *Goodrich's* suit during that period. About five years after the return of the writ, he had a curator *ad hoc* appointed to *Pettingale*, obtained judgment, and seized the lots under an execution.

The seizure under the writ of attachment, was a paper seizure, and could be found only among the papers of a dormant suit, in the parish court of the parish of Jefferson. The law required that the sheriff should have seized and detained the property, that he and his successors should have taken charge of, and kept possession of it. And for the failure of *Goodrich* to have seen this done, and to have prosecuted his suit with diligence, innocent purchasers of the property should not suffer.

Now, it appears that *Pettingale* sold the lots to *D. McMillen*, in 1837, and he to *Bach*, shortly afterwards; that the latter fenced them in, and publicly sold or disposed of some of them, and the owners are made defendants in this case. If the sheriff and his successors in office had actually seized, detained, taken charge of, and kept possession of the lots, and *Goodrich* had prosecuted his attachment suit with diligence, all this would not have occurred. It occurred because it was a paper attachment, apparently abandoned, for years; and should not, therefore, affect third persons. It should not be patched up by an amended return, made fifteen years afterwards, by a person no longer sheriff, and long after a tardy final judgment had been rendered in the case. Nor should parol evidence, to bolster it up, be admitted, to the prejudice of the titles of purchasers of the property not knowing of the attachment.

Sheriffs must seize and hold actually, not fictitiously, where the law requires it; and third persons must not suffer by their neglect to do so.

It is next contended, that the validity of the attachment has become the thing adjudged in this very suit. Admitting that *Goodrich* may avail himself of this defence, without pleading it in the district court, he has not clearly established the plea.

The judgment of the Supreme Court, reported in 9 R. R. 393, supports the plea of *res judicata* more strongly than any other decree in the case. The facts leading to that decision must therefore be examined.

*Goodrich* seized the lots under his execution, in 1842. *Bach* enjoined the sale for himself and his vendees. The Parish Court of Jefferson dissolved the injunction. The First District Court, on appeal, reversed that decision, and made the injunction perpetual, on the ground, that the lots held by *Bach*, and now seized, were not identified with those attached by *Goodrich*. The Supreme Court affirmed the judgment of the district court, perpetuating the injunction. The decree is, therefore, in favor of *Bach*, and yet is urged as adjudging a matter against him—that *Bach's* lot had been attached in 1836. And yet, this is a matter which could not be adjudged at all, until the lots, about to be sold in 1842, were identified with lots supposed to have been attached in 1836; and for the very want of this identification, the injunction was made perpetual.

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But, there was a reservation in the decree, in favor of *Goodrich*, authorizing him to prosecute the sale of the lots, on proving their identity with those attached by him. This assumes, that the lots about to be sold were attached, if identified with those attached; but it is not a decree to that effect; nor could any decree to that effect be made until the identification.

In the opinion, the court nowhere state it as a matter of judgment by them, that the attachment had been legally executed. It is merely stated, that "it is urged that the lots in question, having been attached in 1836, in the suit brought by *Goodrich* against *Pettingale*, they could not be sold to his prejudice." "If this were clearly made to appear," the court continues to say, "the validity of the subsequent sale might well be questioned, as a debtor, whose property is attached, cannot divest himself of it so as to defeat the rights of the attaching creditor."

These, which are the strongest expressions in support of the validity of the attachment, in any part of the opinion, amount to neither a decision for nor against its validity.

The expressions in the opinion are stronger in favor of *Back*; for, the court say, "having shown title in his assignees, it was incumbent on the defendant to show clearly, that the conveyance to *McMillen* was made in fraud of his vested rights under his attachment, and was consequently null and void as to them." In this long protracted litigation *Goodrich* has never shown that. To do so, it was incumbent on him clearly to have shown vested rights, that is, in this case, a valid and continued attachment, or, at least, known to *Back*, if only a paper attachment, at the time of his purchase. These things, alone, could render the purchase illegal as to the vested rights.

Even if the original attachment had been actual, and valid, it would raise a serious question, whether it would continue as to third persons, the sheriff notoriously having no possession, and the plaintiff failing to prosecute his suit with diligence, when they acquired the property.

The decretal part of the opinion is explicit, that *Back's* injunction should be perpetuated. The reservation in favor of *Goodrich* was not put in the form of a decree, and amounts to nothing more than that he should not be prejudiced by the decree. As the Supreme Court, therefore, in neither its opinion nor decree, declared the attachment valid, and, as the district court had not passed upon its validity at all, we cannot consider the validity of the attachment a matter adjudged. If we even should consider the decree in favor of *Back* with the reservations, as a nonsuit against him, it would amount only to a judgment that the parties should "fight their battle o'er again." And so the parties considered it for, in the present suit, the main contest was as to the validity of the attachment, which *Goodrich* bolstered up with wonderful skill, by amendments to the sheriff's return, and parol testimony; and *Back* resisted, as incurably defective.

Believing that the matter in controversy has never been adjudged between the parties, and that the attachment was invalid, because the lots in controversy were never taken into the possession of the sheriff, or, at least, that he did not retain them in his possession, so that they were purchased, possessed, and sold by the appellee, without a knowledge, so far as proved, of the attachment.

It is affirmed, with costs.

ROSE, J. The record in this case was first given to me, and I had come to the conclusion that all the questions raised, except that of the identity of the lots, were closed by the decisions in 9 R. R., and 4 Ann.; but, as two of my



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brethren are of opinion, that the plea of *res judicata* is not made out, I must yield my opinion, so far as to agree with Mr. Justice Slidell, that the question is doubtful; and, if doubtful, that the plea cannot be sustained. I agree in the opinion of the majority of the court, as to all other questions on the case,

Application for re-hearing refused.

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PARTINGALL.

### CELESTE JOSEPHINE BEALE v. SAMUEL RICKER, JR.

In all questions of lesion, the value of the property sold, at the time of the sale, is the rule by which the lesion is to be ascertained. Code 1805. If the value is not fixed within a certain range, by the evidence, the lesion is a matter of conjecture, and must be considered as not proved.

**A**PPEAL from the District Court of the Parish of Jefferson, *Clarke, J. Schmidt*, for plaintiff. *Ogden and Duncan*, for appellant and defendant. By the court: (*Preston, J.*, declined sitting.)

**EUSTIS, C. J.** This action is brought to rescind the sale of the undivided fifth of the undivided half of a tract of land, in the parish of Jefferson, about a league and a half above the city of New Orleans, on the left bank of the river, measuring about eight arpents front, and converging to a point at about one hundred arpents in the rear, together with an equal proportion of all the improvements, rights and privileges thereunto belonging. The sale was made by the plaintiff, to the defendant, for the price of three thousand dollars, for which the defendant gave his bond to the plaintiff's order, payable on or before the 15th of March, 1856, the interest at eight per cent being payable semi-annually. The sale was made in the city of New Orleans, and bears date the 17th March, 1846.

The several grounds on which the sale is sought to be rescinded are : 1st. The failure of the defendant to pay the price. 2d. Deception and fraud on his part, by which he obtained the land for a much less price than its value ; and 3d, lesion beyond moiety in the price.

The case was submitted to a jury, who found a verdict for the plaintiff on the ground of lesion, and not fraud, fixing the value of the land, on the day of the sale, at \$6250.

The only proof of any default on the part of the defendant to pay the interest, is a demand made on the 6th of June, 1849, for two years of arrears, two hundred and eighty dollars, followed by a protest for non-payment. The suit was filed on the 18th of June of that year.

On this verdict the court rendered a judgment in favor of the plaintiff, rescinding the sale of the property described in the petition, but fixing the value, at the day of sale, at \$6250, and allowing the defendant ninety days from the date of the final decree to pay the supplement of the price and retain the property ; the defendant to pay costs. From this judgment both parties have appealed.

Had this action been one to rescind the sale solely on the ground of the non-payment of the price, it might have been necessary to consider this ground ; but we are of opinion that the joining of the two other causes of action, to wit, fraud and lesion, in this action, supercede the necessity of examining its validity.

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In relation to the charge of fraud, we do not think it is proved. Such probably was the opinion of the jury, which we infer from the verdict, and we do not feel ourselves authorized to rescind the sale on the ground of fraud.

The lesion found by the jury consists in the price being less than half of the value of the property sold, by the sum of one hundred and twenty-five dollars. The value, according to the finding, was \$6250. and the price given was \$3000, on the basis of cash.

The greater part of the testimony relied upon by the plaintiff, as supporting the charge of lesion, was taken nearly five years after the sale. The lesion exceeds one-half the value, by five per cent only, on the price. In examining the testimony we do not discover any means of fixing the value of the property, at the time of the sale, with the precision indicated in the verdict. We find it, on the contrary, quite a matter of uncertainty. We think it is necessarily so. The sale was not of a distinct parcel of land, but of an undivided interest of a fifth of a half of a tract of land, measuring about eight arpents, fronting the river, &c., the value of which depended almost entirely upon speculation, and liable to fluctuate accordingly. We do not find in the evidence any standard by which the value, at the time of sale, can be tested, which would authorize a court or jury in rescinding the sale on account of lesion beyond moiety. It is in proof, that this whole tract had been in litigation, and the joint ownership, with the litigants, was of itself an obstacle to its sale, by shares, at even its full value. The expense of a partition, to the purchaser, might exceed this sum of \$125. In all questions of lesion the value of the property sold, at the time of the sale, is the rule by which the lesion is to be ascertained. Code 1805. If the value is not fixed within a certain range, by the evidence, the lesion is a matter of conjecture, and must be considered as not proved. Vide Code, 1805. Pothier Contrat de Vente, 343 *et seq.* Merlin's Rep. *verbo* lesion. Code Napoleon, 1677 *et seq.*

The judgment of the district court is therefore reversed, and judgment rendered for the defendant, with costs in both courts.

Application for re-hearing refused.

### G. KENDALL v. WM. H. BROWN.

Defendant may appear by counsel, or otherwise, to obtain the release of property attached for any irregularities in issuing the attachment, or because the property was not liable to attachment, and, if released for such causes, the defendant would no longer be in court by his property, or person.

But, when a defendant in attachment appears by an agent, and bonds the property attached the agent will be considered as representing his principal, so as to bind him to comply with the conditions of the bond, the essential condition of which is to defend the suit, or abide by the judgment that may be rendered. And it is not necessary, in such cases, to appoint an attorney to represent the absent defendant.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Hoffman and Ogden*, for plaintiff. *J. and J. Henderson*, for defendant and appellant. By the court:

ROSE, J. The defendant is sued, as drawer of a promissory note. Being a non-resident, an attachment was duly issued. A lot, and a quantity of lumber,

was attached. The copies of citation, and writs of attachment, were posted at the church and courthouse doors, as required by law.

KENDALL  
v.  
BROWN.

*Mandell* appeared as the agent of the defendant, and released the property from the attachment on giving bond and security, conditioned that the defendant would satisfy such judgment as might be rendered against him.

An attorney appeared on behalf of the defendant, and applied to set aside the attachment, on the ground, that the surety on the bond was insolvent, and a non-resident.

After hearing the counsel and evidence, the application was dismissed, the plaintiff having justified the sufficiency of the security.

It is true, that for irregularities in issuing the attachment, or, if the defendant's property was not liable to be attached, he might by counsel or otherwise, appear to release it; and, if released for such causes, he would be no longer in court, by his property, or personally.

But, in this case, the defendant, through an agent, had his property released, by giving bond, conditioned expressly, to satisfy any judgment that might be rendered against him in the case. He therefore substituted his bond for the property, and appeared, by an agent, in court, to take steps in the suit. The appearance by an agent, to release the property by bond, bound him to defend the suit, if he had a defence, or to satisfy any judgment that might be rendered.

The plaintiff then served a citation on *Mandell*, as agent of the defendant, took a judgment by default, and had it confirmed. The defendant has appealed.

His counsel contends, that if the suit be an ordinary suit, no citation was served upon the defendant, and, therefore, that the judgment rendered against him is illegal and void.

And second, that, as an attachment suit, the judgment is invalid, because the defendant was not legally brought into, and represented in court.

The suit was not an ordinary, but an attachment suit; and, therefore, it is necessary to examine only the last ground offered for a reversal of the judgment.

The attachment having been regularly levied, and property of the defendant taken into the possession of the sheriff, it represented the defendant in court.

An appearance to bond the property must be construed as an appearance with power to comply with the conditions of the bond; the essential of which were to defend the suit, or abide by any judgment that might be rendered in the case. It was then his interest and duty to defend his own suit. It was not the business of the court, to appoint an attorney to represent him, since he had appeared and bound himself to defend his own suit, or to pay such judgment as might be rendered against him. This is the necessary inference from art. 259 of the code, and the court could not exercise the authority, given by art. 260, to appoint an attorney to represent him, when he had appeared by his agent to bond personally, and, therefore, to defend the suit personally.

The judgment is affirmed, with costs.

Re-hearing refused.

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### W. E. THOMPSON v. R. R. BARROW.

Defendant pointed out to the sheriff, for seizure under two executions, property which, he stated at the time, was far more than sufficient to satisfy them. The sheriff seized it under those executions, and under that of plaintiff at the same time. *Held*: We are not pre-

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v.  
BARROW.

pared to say, that, under the circumstances, the defendant was entitled to notice of seizure.

**A** PPEAL from the District Court of Terrebonne, *Randall. J. J. H. Halsey and J. D. Cole*, for plaintiff. *J. C. and A. Beatty*, for defendant. By the court: (*Slidell, J.*, absent.)

ROST, J. There is no error in the judgment in this case. The defendant had pointed out to the sheriff for seizure, under two other executions, property which, he stated at the time, was far more than sufficient to satisfy them. The sheriff seized it under those executions, and under that of *Thompson*, at the same time. We are not prepared to say that, under those circumstances, the defendant was entitled to notice of seizure. *Hewitt v. Stephens*, 5 Ann. 640. But if he was, he had left his residence, under circumstances which authorized the appointment of a curator *ad hoc*, to represent him, and the service made upon the curator *ad hoc*, appointed by the court, is valid.

The words, "acres or arpents," used in the advertisement of the property, when the word "acres," should alone have been inserted, refer only to a considerable portion of the land seized, and the word "arpents," taken in connection with the entire advertisement, is mere surplusage. The advertisement, after describing this and other sections of land, the contents of which are given in acres, sums up the whole as follows: "containing, together, 1696 acres and 23-100ths." They clearly showing, that the contents of section No. 40, were also measured in acres.

There was no pretext for enjoining the sale, and damages were properly allowed.

The judgment is affirmed, with costs.

### H. STACKHOUSE v. R. B. KENDALL.\*

In an action to recover the price of a slave, on the ground that he was unsound at the date of the sale, the plaintiff cannot recover where no *post mortem* examination was made, and the proof of the nature and duration of the disease rested exclusively upon the conjectural and conflicting opinion of physicians.

**A** PPEAL from the Second District Court of New Orleans, *Lea, J. Hoffman and Ogden*, for plaintiff. *Howard*, for defendant. By the court:

ROST, J. The plaintiff seeks to recover the price of a slave, purchased by him of the defendant, on the ground that at the time of the sale the slave had the consumption, of which disease he has since died. The defendant pleaded the general issue, and cited his vendor in warranty. Two antecedent vendors were successively called in warranty, and they all joined in the defence.

The plaintiff's petition was dismissed as in case of nonsuit, and he appealed. The defendant asks that the judgment be amended so as to be final in his favor.

No *post mortem* examination of the slave was made, and the proof of the nature and duration of the disease rests exclusively upon the conjectural and

\*This case is in the list of cases not reported by my predecessor. I have inserted it because Judge *Eustis* refers to it as authority in the case of *Hooper v. Owens*, p. 306. R.

conflicting opinions of physicians. According to the opinion of *Dr. Stillette*, the disease is not proved. On the other hand, the family physician of the plaintiff testifies, that the impression which the boy made on him, when he first saw him, was that he could not live; that his chest was uncommonly small and out of proportion with his height, and that in persons similarly constructed the lungs are not long enough to meet the secretions of blood with the body. He further states it as his opinion, that the slave died of consumption, and that the disease was the consequence of his constitutional conformation. If it be true that persons of small and narrow chests are invariably consumptive, this peculiar conformation is a visible defect, and the purchaser who buys a slave thus formed, might, perhaps, be considered as taking on himself the risk of consumption. But, be this as it may, the evidence of the existence of the disease, at the time of the sale, is such as we have repeatedly held we could not act upon. *Executors of Dupre v. Prescott*, 5 Ann., 592.

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v.  
KENDALL.

The physician who last saw the slave states, that the day before he died he was suffering from diarrhea and hectic fever, but that he showed no sign of approaching dissolution. It is proved that the cholera was among the plaintiff's slaves at that time, and the rapidity and manner of the death point to that disease as the cause. The evidence induces us to believe that the fever was the result of debility, which followed the diarrhea; that the diarrhea may have been, as it usually is, caused by a change of food and water on a subject lately come to Louisiana; that it was aggravated by the damp and impure atmosphere of the pork warehouse in which the slave was employed, and that it terminated in cholera.

We are of opinion that the defendant is entitled to a final judgment.

It is therefore ordered, adjudged and decreed, that the judgment in this case be amended, and that a final judgment be entered in favor of the defendant, and against the plaintiff, with costs in both courts.

## PAYNE AND HARRISON v. THE INDEPENDENT TOWBOAT COMPANY.

Privilege against a steamboat, for cord wood furnished by contract, allowed, under the act of the Legislature of the 15th March, 1842.

**A** PPEAL from the Second District Court of New Orleans, *Lea, J. C. Redmond*, for plaintiffs. *Z. Latour*, for defendants. By the court:

SLIDELL, J. We think with the district judge, that the 3d section of the Act of March 15, 1842, p. 282,\* conferred a privilege upon the appellee, whose claim was for cord wood, furnished to the steamboat by contract, and not taken against the will of the owner of the wood.

Judgment affirmed, with costs.

Application for re-hearing refused.

\*The following is the section of the Act cited: Sec. 3. *Be it further enacted, &c.* That the claim against steamboat owners for cord wood shall be of the first privilege against steamboats, for and during the term of eight months from the time that such claim accrues, as regards all boats running beyond the limits of the State, and three months for boats running within the limits of the State.

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### HENRY BOYCE v. J. AND H. CAGE.—N. C. WADE, Warrantor.

To constitute a sale *per aversionem*, there must be either a distinct or separate object described, such as the manor of dale, an island, an enclosed field; a sale is also considered as made *per aversionem* when it is for a total sum, and assigns to the land sold existing and visible boundaries, such as rivers, highways, fences, pieces of stone, iron or wood, showing the starting point and direction of the dividing line with the adjoining tenements. These last sales are held to be *per aversionem* on the presumption, that the parties to them have their attention fixed, rather upon the boundaries than upon the enumeration of quantity.

**A**PPEAL from the District Court of the Parish of Terrebonne, *Randall, J.* *J. C. and A. Beatty*, for plaintiff. *E. A. Johnson*, for defendants. *John Ker and Connolly Mercier*, for warrantor. By the court:

**ROSE, J.** This is an action of boundary between two parties, claiming under the same original grant. The title of the plaintiff is the oldest in date, and as there is no evidence of adverse possession by the defendant, to sustain the plea of prescription, the district court properly allowed the plaintiff the superficial quantity of land which his title calls for; and the only questions in the case, presenting any difficulty, are those which arise on the claim of warranty of the defendants.

The district court found the extent of the conflict between the adjoining tracts of land to be one hundred and fifty-four arpents 95-100. This being taken from the defendants, judgment was rendered in their favor, against the immediate warrantor, *Tobias Gibson*, for the price he had received. A like judgment was rendered in favor of *Gibson* against his vendor, *Nathaniel C. Wade*, but the court refused to give judgment in favor of *Wade* against the widow and heirs of *Samuel Tanner*, his vendor, and discharged them from the warranty. *Wade* alone has appealed.

He first contends, and we agree with him, that he is entitled to the same judgment against his vendors which will be rendered against him, and that there are no admissions in his answer, and that of *Gibson*, to the call in warranty, which can increase their liability as vendors.

But he further contends, that no judgment should have been rendered against the other warrantors, because the true boundary between the two adjoining tracts of land, of the plaintiff and defendant, must be ascertained by first fixing the boundary of another tract, called the Walker tract, adjoining that of the defendant above, and forming part of the same grant. That the quantity of land purchased by the defendants, in those two tracts, was 1800 superficial arpents; and that as no other location is given in the acts, except a front on the Bayou Caillon, the defendants have no claim beyond the quantity purchased. And as the boundary, established by the district court, leaves them 1846 arpents, they have suffered no eviction, and have no action in warranty.

The defendants, on the contrary, maintain that the sales under which they hold the two tracts of land, are sales *per aversionem*, and that, although in consequence of a bend in the bayou, the land contains more superficial arpents than is mentioned in the acts, they have a good title to all the land included within the boundaries, mentioned in the acts, and should be indemnified for the portion adjudged to the plaintiff.

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v.  
CAGE.

There is no doubt that the boundary must be established by first locating the Walker tract; and the nature of the sale under which the defendants hold that tract, must determine the case. It is a sale from *Turner to Cage*, of a tract of land previously sold by him to *Robert G. Walker*, containing about twenty-five arpents front on Bayou Caillon, by forty in depth, and having one thousand arpents in superficies, to begin above at a point distant twenty-five arpents from the upper line of the grant, of which it forms a part, and to run down the bayou for quantity.

To constitute a sale *per aversionem*, there must be either a distinct or separate object described, such as the manor of dale, an island, an enclosed field. A sale is also considered as made *per aversionem* when it is for a total sum, and assigns to the land sold, existing and visible boundaries, such as rivers, highways, fences, pieces of stone, iron or wood, showing the starting point and direction of the dividing line with the adjoining tenements. These last sales are held to be *per aversionem*, on the presumption that the parties to them have their attention fixed, rather upon the boundaries, than the enumeration of quality. *Fisk v. Fleming, Syndic*.

In the sale of the Walker tract there was no fixed and visible boundary. If it were conceded that the upper boundary of the tract was given with sufficient certainty, because its position might have been ascertained by a survey, no lower boundary at all is mentioned, the act merely stating, that the land is to have about twenty-five arpents front, and to contain one thousand superficial arpents. The attention of the purchaser could not, therefore, have been fixed upon the boundaries, and he must have relied upon the numeration of quantity; that quantity alone the defendants could claim from their vendor. It is in evidence, that at the institution of this suit, they were in possession of eleven hundred and twenty-two arpents 95-100 under that title.

The tracts which they purchased from *Gibson*, and on which the conflict occurs, was sold as containing seven and a half arpents front by forty deep, adjoining the land above mentioned; and as the only boundary assigned had never been determined, this sale was not *per aversionem*, and only transferred to the defendants three hundred superficial arpents of land. It is admitted that at the institution of this suit, the defendants had taken possession, under it, of three hundred and ten superficial arpents.

The tract of twelve and a half arpents front, sold by *Gibson* to the defendants, being above the fixed boundary of the Walker tract, cannot be reached by the present action, and the excess in the contents of it, over the quantity sold, if any, may be left out of view. The defendants have, under their purchase of the two other tracts, an excess of one hundred and thirty-two arpents 95-100 over what was sold to them, and to that extent they have no claim in warranty; deducting this from one hundred and fifty-four 96-100, the admitted extent of the conflict between the plaintiffs and defendants, there remains twenty-two arpents and 100th, which, at the rate of \$7 50 per arpent, there must be judgment against the appellant in favor of *Gibson*, and in his favor against *Mrs. Tanner* and the heirs of *Lemuel Tanner*. *Tobias Gibson* not having appealed, the judgment rendered against him, in favor of the defendants, remains undisturbed.

It is ordered, that the judgment in this case be reversed. It is further ordered, that *Tobias Gibson* recover from *Nathaniel C. Wade* the sum of \$165 07½ and costs in the district court. It is further ordered, that *Nathaniel*

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v.  
CARR.

*C. Wade* have a judgment for the like sum against *Mrs. Ellis Tanner*, personally, or her assumption to pay the debts of *Lemuel Tanner*; and also for their virile share against *Joseph W. Tanner*, *Esther Tanner*, *Mary Tanner*, *Elizabeth Tanner*, *B. T. Tanner*, *Robert R. Tanner*, all of age; and *Washington Tanner*, *Bridget Tanner* and *Louisa Tanner*, represented by *Celeste Tanner*, their mother and tutrix. It is further ordered, that one-half of the costs of appeal be paid by *Tobias Gibson*, and the other half by *Lemuel Tanner*.

### SAME CASE—ON A RE-HEARING.

When two pieces of ground have been sold by one and the same contract, with the expression of the measure of each, and there be found a less quantity in one and a larger quantity in the other, the deficiency of the one is supplied by the overplus of the other, as far as it goes. C. C. 2475.

By the court :

ROST, J. In the original argument in this case, we were not referred to article 2475 of the Code, and we overlooked, on the decision, the singular disposition it contains.

On general principles, it is clear that the excess in the tract, above the fixed boundary, where the survey begins, could not have been brought in to supply a deficiency below; but the article quoted provides, in general terms, that when two pieces of ground have been sold by one and the same contract, as was the case here, with the expression of the measure for each, and there be found a less quantity in one, and a larger one in the other, the deficiency of the one is supplied by the overplus of the other, as far as it goes. Taking the two tracts together, the land remaining, after allowing the plaintiff his quantity, is more than the defendant purchased. The judgment must, therefore, be for the appellant, *Wade*, and the heirs of *Tanner*.

It is therefore ordered, adjudged and decreed, that the judgment heretofore rendered in this case, be set aside. It is further ordered, that the judgment of the district court, so far as it is against *Nathaniel C. Wade*, and in favor of *Tobias Gibson*, in warranty, be reversed, and that there be judgment in his favor against the said *Gibson*, with costs in both courts. It is further ordered, that the judgment discharging the widow and heirs of *Tanner* from the warranty, be affirmed.

### SAMUEL H. GILMAN v. BONNER AND SMITH, AND STILLMAN, ALLEN & Co.

The plaintiff was employed by agents, who disclosed their principals, with whom he corresponded directly, and to whom alone he rendered services. Held: That the agents were not bound.

APPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Thomas Hunton*, for plaintiff, *Goold and Howard*, for defendants. By the court :



PRESTON, J. The plaintiff is an engineer. *Stillman, Allen & Co.* are the proprietors of the Novelty Iron Works of New York, and *Bonner and Smith*, their agents in New Orleans. The suit is for a large amount, for services rendered by the plaintiff to the defendants.

The plaintiff alleges, that he was employed by *Bonner and Smith*, to go into the country parishes, to solicit and make contracts on behalf of *Stillman, Allen & Co.*, for the supply of engines and machinery for sugar mills, sawmills, and other purposes; that *Stillman, Allen & Co.*, executed same contracts, made by him on their behalf, corresponded directly with him in reference to those contracts, and that he was recognized as agent, for those purposes, by them, and by *Bonner and Smith*.

He alleges, that he traveled through the country, occupied much time, and incurred great expense in performing these services, and made contracts for engines and machinery, to the amount of \$148,148; that some of these contracts were executed by *Stillman, Allen & Co.*, and the machinery furnished, but that they, wrongfully and in bad faith, refused to execute other similar contracts. Lastly, he alleges, that, for his services and labor, he was entitled to receive from the defendants, pay and commissions, at the rate of 2½ per cent on the cost of the machinery for which he might procure contracts; and that, in all cases in which he personally superintended the erection of the machinery furnished by *Stillman, Allen & Co.*, he was to receive an additional compensation of four per cent on the cost of the same.

*Bonner and Smith* excepted, that the allegations of the plaintiff's petition did not show that they were personally liable for his claim; so the court decided, and he has appealed.

The plaintiff's petition clearly shows, that *Bonner and Smith* were agents of *Stillman, Allen & Co.*; that the names of these principals were disclosed to the plaintiff in employing him, and that he rendered his services to the principals, and not to the agents. He and the principal corresponded directly in relation to those services.

There is an allegation, that the defendants were to pay 2½ per cent commission on the value of the machinery for which he made contracts. But this evidently means, the defendants to whom he rendered the services, and 2½ per cent on the value of their machinery, not the defendants, *Bonner and Smith*, to whom he rendered no services, and who had nothing to do with the machinery, except as agents.

As agents merely, they are not liable at all; and liability cannot be presumed against them, without an agreement express or implied. It is certainly not to be presumed in this case, where the agents disclosed their principals, where the plaintiff corresponded directly with them, and rendered all his services to them alone.

Our code declares, "That the mandatary who has communicated his authority to a person with whom he contracts in that capacity, is not answerable to the latter for anything done beyond it," and, *a fortiori*, for nothing done within the mandate. The mandatary is responsible to those with whom he contracts, only when he has bound himself personally. Code, arts. 2981, 2982. There is a decision to the same effect, 13 L. R., 20.

The plaintiff contends, that he was to share commissions of five per cent, with the agents, *Bonner and Smith*. He does not so state in his petition, but that he was to receive 2½ per cent commission for his own compensation.

The judgment of the district court is correct, and is affirmed, with costs.

## JOHN HARRINGTON v. NICHOLS et al.

The plaintiff leased his steamboat by public act, in which, as additional security for the performance of the stipulations of the lessees, the parties annexed and made a part of the act, a bond, signed by the lessees with *B.* and *M.* as securities. The condition of the bond bound the obligors to some, but not to all of the obligations of the lessees, resulting from the lease. The owner of the boat sought to bind the securities on the bond for a non-compliance with the stipulations of the lease, some of which formed no part of the obligations resulting from the bond. *Held*: It is true that the lease and the bond were executed at the same time; but, as the same parties did not sign both, they cannot be viewed as one contract in relation to the sureties, who only signed the bond. The declaration of the lessees, in the contract of lease, cannot prejudice their sureties, who can only be held bound as they agreed to bind themselves.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J.*  
*Mott and Ogden*, for plaintiff. *Roselius and Emerson*, for defendants.

By the court:

*Rost, J.* The plaintiff leased the steamer *Nathan Hale*, for six months, to *Peter Nicholls, J. H. Miller* and *J. R. Hartzock*, at the rate of \$450 per month, payable in advance. The lessees bound themselves to deliver the boat to the lessor at the wharf, in this city, at the expiration of the lease, in the same good order in which they took her, the ordinary wear and tear excepted, and as clear of debt as they received her. The act of lease contains the following clause:

"The contracting parties, the better to secure the execution of the present contract, and the payment of the six installments afore-mentioned, have requested the undersigned notary to annex to the present deed, to be considered as a part thereof, a certain bond, for the sum of \$3000, bearing date the 19th inst. signed by *Messrs. Peter Nicholls, James H. Miller, and J. R. Hartzock*, as principals: and *C. C. Burr* and *J. F. Mayer*, as security; which bond has been signed by me, the notary, to identify it herewith, and receive, when necessary, its full execution."

The condition of the bond referred to is simply, that, if at the expiration of the lease, the lessees shall deliver the steamer to the plaintiff, or his agent, at the wharf, in the city of New Orleans, in the same good order in which they take her, the ordinary wear and tear of the boat excepted, and as clear of debt as they receive her, and, in case of loss, shall pay the sum of \$3000, the insurance which they engage to effect upon said steamer, the obligation is to be null and void, otherwise to remain in full force.

The lessees failed to deliver the boat in New Orleans at the expiration of the lease. The plaintiff found her at St. Louis, where she had been attached for privileged debts, contracted by them, and was compelled to pay those debts before he could take possession of her. He claims, in this suit, from the lessees and from their sureties, *in solido*, the amount thus paid by him; also the amount of a bill for servant hire and groceries sold to the lessees, and a balance due on the two last installments of the lease.

The answer sets up many grounds of defence, but the only two relied on in this court, by *Mayer*, the only appellant, are the following: that the sureties are not bound for the arrears due on the two last installments of the lease; and further, that the amounts which the plaintiff pretends to have received on account of

said installments, should be imputed to the debts, for which the sureties agreed to become liable. *Mayer*, one of the sureties, has appealed from the judgment allowing the entire claim of the plaintiff, and the latter has joined in the appeal, praying that the judgment be amended in his favor.

It is true, that the lease and the bond were executed at the same time. But, as the same parties did not sign both, they cannot be viewed as one contract in relation to the sureties, who only signed the bond. The declaration of the lessees, in the contract of lease, cannot prejudice them, and they can only be held bound as they agreed to bind themselves. It may have been the intention of all the parties, that the contract of suretyship should extend to the installments of the lease. But, we cannot go behind the acts to ascertain that intention; and if they even leave the liability of the sureties doubtful, the doubt must inure to their benefit.

The imputation which the defendant and appellant now attempts to make, is not authorized by the facts of the case. Some of the payments were expressly on account of the lease, and all were made long before his liability on the bond accrued, in consequence of the payment, by the plaintiff, of the debts of the boat in St. Louis. At the date of those payments, it is not shown that anything was due by the lessees, except the unpaid installments of the lease, and the amount of the plaintiff's bill for groceries and servant hire. His consent that the payments not expressly made on account of the lease, be first applied to the payment of this bill, and that the balance remaining be imputed on the lease, does full justice to the appellant.

It is admitted, that the plaintiff had to pay \$718 46, in St. Louis, for privileged debts existing on the boat. For this sum, with legal interest from judicial demand, the appellant is clearly liable. We will further allow fifty dollars damages for the non-delivery of the boat in New Orleans, clear of debt.

It is therefore ordered, that the judgment, so far as appealed from, be reversed. It is further ordered, that the plaintiff recover from the defendant, *J. F. Mayer*, \$768 46, with legal interest from the 10th of August, 1847, till paid, with the costs of the district court; those of this appeal to be paid by the plaintiff and appellee.

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#### SAME CASE—ON A RE-HEARING.

By the court :

ROST, J. In this case, the court having overlooked an agreement, in the record, by which the defendant, *Maria F. Burr*, administratrix of the succession of *C. C. Burr*, was authorized to prosecute her appeal without giving bond, a re-hearing was granted as to her.

The argument in support of her application has failed to convince us, that there was error in the judgment, to the prejudice of her co-defendant. The same judgment must, therefore, be entered against her.

It is ordered, that the judgment of the court below, rendered against *Maria F. Burr*, administratrix of *C. C. Burr*, be reversed. It is further ordered, that the plaintiff recover from the defendant, *Maria F. Burr*, in her said capacity, \$768 66, with legal interest from the 10th of August, 1847, till paid, and the costs of the district court; those of this appeal to be paid by the plaintiff and appellee

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### Capt. HARRIS STACKPOLE et al. v. OSWALD WICKHAM.

The defendant's commission had been out eighty-two days, and no excuse for the delay was shown, and the district judge was of opinion that due diligence had not been used. *Held*: That defendant was properly ruled to trial.

A vessel had made a safe voyage from Turk's Island to New Orleans. *Held*: That it was not necessary for the plaintiff to show, affirmatively, that she was seaworthy, and provided with men and provisions, and every other requisite for such a voyage.

The verdict was written on the back of a document attached to a petition, instead of being written on the back of the petition itself. This circumstance was not urged as a ground for a new trial. *Held*: The ground of nullity, set up for the first time in the Supreme Court, is too frivolous to deserve further notice. The document was annexed to the petition, and may fairly be viewed as a part of it.

**A**PPEAL from the Fourth District Court of New Orleans. This case was tried by a jury before *Strawbridge, J. J. L. Halsey*, for plaintiff. *Wolfe and Singleton*, for defendant. By the court: (*Preston, J.*, absent.)

*Rost, J.* Our attention has been called to the several bills of exception which the record contains.

On the day of trial, the defendant moved for a continuance, on the ground that a commission sent to New York to take the testimony of certain witnesses, had not been returned. The commission had then been out eighty-two days. The defendant showed no excuse for the delay, and the district judge being of opinion that he had not used proper diligence, ruled him to trial.

We are unable to say that this was not a proper exercise of the discretion vested in the district judge.

After the cause was called for trial, the defendant moved that the exception contained in his answer, "that the petition discloses no cause of action," be first taken up and tried.

Under a rule of court, which prohibits counsel from making any motion when a cause is called for trial, if such motion could with propriety have been made previous to that time, the court refused to entertain the motion, but reserved to the defendant his right to the benefit of the exception on the trial.

The defendant was bound to know the rules of court and to conform to them; and if the district judge had considered his going to trial, on the merits, as a waiver of the exception, we should not have disagreed with him. It was tried, however, with the main issue, and clearly overruled by the judgment rendered on the verdict. We think it was properly overruled.

The plaintiff having found no salt at Grand Turk, brought his vessel, in ballast, to New Orleans. The defendant contends, that under his charter-party and the custom of trade, he should have gone to Salt Key and ascertain whether he could not get a cargo there. The charter-party is for a cargo of salt to be taken in at Turk's Island; and the judge, in his charge, told the jury that the alleged custom of trade which bound the plaintiff to go to Salt Key under such a charter-party, in case he found no salt at Grand Turk, was not proved. The defendant excepted to the charge on the ground, that the judge is prohibited from charging the jury on questions of fact. Had the evidence in relation to this custom of trade been such as would have authorized a verdict against the plaintiff, the charge of the judge might have made it necessary to remand the

case; but as we are satisfied that no such verdict could be rendered, under the evidence, we would be doing a vain thing if we made that disposition of it. STACKPOLE  
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We think with the district judge, that as the vessel had made a safe voyage from Turk's Island to New Orleans, it was not necessary for the plaintiff to show, affirmatively, that she was seaworthy and provided with men and provisions, and every other requisite for such a voyage. The fact that the verdict was written on the back of a document attached to the petition, instead of being written on the back of the petition itself, was not one of the grounds taken in the application for a new trial. This case differs in that respect from that of *Dubertrand v. Laville*, 8 L. R. 275. In that case the verdict had been written in French, and was radically defective. Here there is a valid verdict, and the ground of nullity, set up for the first time in this court, is too frivolous to deserve further notice. The document was annexed to the petition, and may fairly be viewed as a part of it.

On the merits, the amount allowed by the jury was considered proper by the district judge, and is fully sustained by the evidence.

The judgment is affirmed, with costs.

### THE STATE OF LOUISIANA v. THE ORLEANS NAVIGATION COMPANY.

It was decided in this case, that the Orleans Navigation Company had forfeited its charter, by violating the conditions of the act of incorporation; but held, "The charter requires the company to keep, ordinarily, three feet of water [in the canal] at low tides; yet the fact of less water being found occasionally, in consequence of extreme low stages of the lake, should not be attended with a forfeiture of the charter."

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Isaac Johnson*, Attorney General, and *Roselius and Burthe*, for the State. *A. Hennen*, and *Benjamin and Micou*, for the defendant. By the court:

**PRESTON, J.** The Bayou St. John was a navigable stream previous to the cession of Louisiana to the United States. The Spanish Governor, the Baron Carondelet, excavated the basin and canal to connect the navigation of the bayou with the rear of the city. Both were of smaller dimensions than at present, yet they were used by the small schooners on the lakes.

On the 3d of July, 1805, the Governor and Legislative Council of the Territory of Orleans, incorporated "The Orleans Navigation Company." By the 9th section of the charter it was provided, that, "As soon as the company shall have improved the navigation of the Bayou St. John, so as to admit, at low tides, vessels drawing three feet water, from Lake Ponchartrain to the bridge at the settlement of the bayou, then the president and directors shall be entitled to ask, have, and receive, from every vessel passing in or out of the bayou, a sum not exceeding one dollar for every ton of the admeasured burden of the vessel, and so in proportion for every vessel of a burden less than one ton. And when further improvements shall permit vessels drawing three feet water to pass from the bayou by the Canal Carondelet to the basin, terminating the same at the city ditch, the president and directors shall be entitled to receive an additional toll, not exceeding a dollar per ton."

As early as 1820, great complaints were made by citizens of this State and others, interested in the navigation of Lake Ponchartrain, against the company,

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of a violation of their charter, and of their failure to keep the Bayou St. John and Canal Carondelet in navigable order. And the Legislature, by a resolution of the 16th of February, 1821, directed a suit to be instituted by the attorney general against the company, for the forfeiture of its charter, for malfeasance and nonfeasance. The case was decided against the State. 11 M. R. 309.

In 1832, the complaints having been renewed, the State incorporated the New Orleans Canal and Banking Company; and, as bonus, exacted the construction of a basin, and a canal from the city to the lake, capable of admitting vessels drawing six feet of water, and at a reduced rate of toll of  $37\frac{1}{2}$  cents a ton. This canal has long since been completed, and compelled the defendants to reduce their tolls to a still lower rate. They then borrowed a large amount of money but do not appear to have expended it with success, as their affairs have declined constantly since; and the district court came to the conclusion, on the evidence, that they were totally insolvent.

Again, in 1835, the Legislature directed proceedings to be taken against the company, for failing to keep the navigation in the situation required by the charter; but, for some reason, no effectual proceedings were taken.

The evidence, in this case, fully supports the conclusion of the court, that the defendants are insolvent. Their own witness believes that, without aid from other sources than the stockholders, the company will never be able to pay its debts. All its property, except its rights upon the basin, canal, and Bayou St. John, has been sold. The revenues from them have been under seizure by the sheriff for — years, and do not pay the interest on their debts. Those revenues are daily diminishing, while their debts are increasing, and their stock of one hundred dollars a share has been sold for fifty cents.

If the navigation is not in the situation required by the charter, the company have no resources to improve it; indeed, none to keep the works from constant dilapidation, and the basin, canal, and bayou, from depreciation in value.

A single witness represents, that he is authorized by a party, whom he refuses to disclose, to take a lease of the property of the company for twenty years, and put the navigation into a situation which will respond to the provisions of the charter. As he is not authorized to disclose the party for whom he acts, he afforded the district court no means of judging of the ability of the party to accomplish the objects of the charter. The same objects being those of the State, this court has delayed its decision some time, the Legislature being in session, to see if the party would openly disclose his means, and make some arrangement satisfactory to the State. It has not been done.

For the same reason that the evidence produced no impression on the district court, it has afforded no satisfaction to this court. There is not that openness and publicity on the part of the secret party and his proposals, which properly belong to all matters of public concern, and without which, confidence cannot be inspired.

The evidence in this case satisfies us, that the company have not kept the navigation of the canal and bayou in the situation required by the charter; but, on the contrary, have, for a length of time, violated their charter, by not keeping the depth of water required, either in the bayou or canal, and, indeed, almost abandoning both.

It is contended, that the charter requires the company to keep, ordinarily, three feet of water at low tides, but that the fact of less water being found occasionally, in consequence of extreme low stages of the lake, should not be attended

with a forfeiture of the charter. We concur in that opinion, but are satisfied by the evidence, that there is not ordinarily, at low tides, three feet of water throughout the extent of the navigation.

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*Captain Vidal* says, that in the winter time, at low tides, there is only two and a half feet water on the bar.

*Captain Sarazin* has found the water several times but two and a half feet deep on the bar.

*Mr. Blanc* testifies, that there is not more than two and a half feet water at the mouth of the canal. We understand this to be the ordinary state of the low water stage, because, he says that, in low water, the bayou, at its junction with the Canal Carondelet, has not more than two feet four or five inches in depth. He further proves, that the average depth of water at the bar, during the last ten years, at low tide, has not been more than two feet, four, five or six inches, and this, with a width or channel hardly sufficient for a small vessel to pass.

*Captain Dumas* sounded the bar at the mouth of the bayou, at low tide, and found but two and a half feet water, and could not get out with his schooner, light, having only that draft.

*Captain Palpa* sounded the bar at the mouth of the bayou, and found but the same depth of water, at low tide; and, shortly before the trial, had to pay five dollars for lightening his vessel, drawing but three feet water.

*Mr. Clark*, proves the same thing. And *Mr. Buisson*, who probably sounded the bayou for the purpose of giving the court exact information as to its depth at low tide, gives a still more unfavorable account of the want of the depth of water required by the charter.

Other witnesses prove, and the books of the company show, that vessels drawing four or five feet of water, have entered and gone out. The prevalence of southern and easterly winds fills the lake from the sea, and produces, generally, sufficient water for the navigation. But the evidence preponderates in showing, that the ordinary stage of low water, both at the mouth of the canal and mouth of the bayou, and, perhaps, at intermediate stages, opposite the draining machines, is less than the three feet required by the charter of the company.

In fact, *Mr. Fagan*, who has been superintendent of the works of the company for near twenty years, says, "he believes it to be his duty to keep a record of the depth of the water on the bar, and did so for several years, until of late years the water got so very bad, and the trade also, that he did not think it necessary to keep a record."

A dredging machine, which the company had for the purpose of deeping the bayou, was sunk two or three years ago, and they have not replaced it, nor even raised it; so that it has become, itself, a dangerous obstruction to the navigation. To use the expression of one witness, the navigation has become most horrible; and, of another, detestable. The canal and bayou are filling up every year. The harbor is dangerous, and the works of the company, generally, are rotting down, dilapidating, and seem to be abandoned.

The navigation, which, by the improvements of near half a century, should have attained all the perfection of which it is susceptible, is obstructed so as to cause great expense and delay to navigators, by lightening; is dangerous, so as often to subject the vessels and commerce to much loss, for which there is no recourse, except against an insolvent corporation. In fact, we doubt if the bar, at least, which affects the whole navigation, is in a better situation, than in the time of the Baron Carondelet. So that the whole object of the act of incorporation has failed.

STATE OF LOUISIANA, v. THE ORLEANS NAVIGATION COMPANY. Proceeding, therefore, to render such judgment as it appears to us should have been rendered in the district court, It is ordered, adjudged, and decreed, that the corporation of the Orleans Navigation Company has forfeited its charter; that it be dissolved, and henceforth extinct, for the violation of the conditions of the act of incorporation.

### LOUIS DELACROIX v. J. NOLAN.—ADELINE DELACROIX, Intervenor.

Where a husband sells the property of the wife, and she appears and makes herself a party to the act, with knowledge of her rights, she thereby consents to the sale. Wives should, under such circumstances, be held to the same rules as other persons, who consent to the sale of their property by another.

**A**PPEAL from the District Court of West Baton Rouge. *Burk, J. Lacy*, for plaintiff. *Greves*, for defendant. By the court:

**PRESTON, J.** The plaintiff alleges, that in his own right, and as tutor of his minor child, *Avinente*, he is the legal owner, together with *Mrs. Adeline Gorret*, of a small tract of land, situated in the parish of West Baton Rouge. He claims, that it belongs to them, by inheritance from his deceased wife, *Felicite DeLacroix*, one of the heirs of *Xavier Theriot*, as having been ceded to her by the other heirs, on account of her rights in the succession.

He alleges, that the defendant has taken possession of the land, without color of title, but, on the contrary, with a full knowledge of the title of the true owners; that he has cut down, carried away, and used the timber, which is valuable, and thereby caused the owners damage, to the amount of two thousand dollars. He asks judgment in their favor for the land and damages.

*Mrs. DeLacroix* intervenes, and denies that the defendant has any valid title to the land, and claims twenty-five, out of thirty-two parts of it. She pleads, and it is sufficiently shown by her and the plaintiff, that the land was the sixth of a tract which belonged to *Xavier Theriot*. He died, leaving six heirs. Five of them ceded the sixth of the tract to *Felicite Theriot*, the remaining heir, on account of her rights in the succession. She was the first wife of the plaintiff, the mother of the intervenor, and the sixth of the tract thus ceded, is the land in controversy.

*Felicite Theriot* died, leaving two children, by the plaintiff, the intervenor, and a daughter, who inherited from her the land in controversy, in equal portions. The plaintiff married a second time, by which marriage he has a son. One of the children, by his first marriage, died. The intervenor inherited from her 9-32 parts of the land, making her whole interest 25 out of 32 parts. The plaintiff, as father, and his child, as half-brother to the deceased, inherited the first four and the last three parts, out of thirty-two of the land.

The defendant plead *lis pendens*, that the same claims were sued for, in the suit we have just decided. He does not make that clearly appear. Nor does he satisfy us, as plead by him, that the heirs of *Xavier Theriot* transferred to him the land in controversy, by the transfer to him of a suit against one *Brossard*, in relation to their lands, and which resulted in a favorable decision.

He next pleads, that he purchased the land from the intervenor and husband, on the 19th of October, 1846. We have seen, that she owned twenty-five, out of thirty-two parts of the land. The defendant produces a notarial bill of sale, of that date, for the whole tract, from *Cheri L. Gorret*, the husband of the intervenor. The land did not belong to him, but to the wife; still, we think the



act is binding upon her. She appeared, and made herself a party to the act, with all the knowledge of her rights, in relation to the land which she now possesses. She thereby consented, that the land should be sold to the defendant. Even, if she thought she could defraud him, which is by no means to be supposed, she should not be permitted to do so. We cannot see why wives should not, under such circumstances, be held to the same rules with other persons, who consent to the sale of their property by another.

There are strong expressions in the deed, unusual in the mere renunciation of a wife's legal mortgage. She renounces all her rights, as well as those of mortgage; she ratifies the act of sale; she binds herself and her heirs, at all times, to acknowledge the validity of the act of sale, as well as her renunciation. She did all this out of the presence of her husband, and then signed the act by his authority. There is not the slightest reason to believe, that either he, or the notary, exercised any undue influence. or practiced any fraud upon her, or that she was ignorant that the land belonged to her. And even, if from obscurity in the expressions of the cession of the heirs, *Theriot*, of the land, to the husband for her, they believed that the land was conveyed to, and belonged to the husband, the result would be the same. They intended to convey it, with an entirely unincumbered title to the defendant. We have no hesitation, therefore, in pronouncing that *Nolan* acquired from them a good title to twenty-five, out of thirty-two parts of the land.

The plaintiff and his son are entitled to recover the other seven parts of the land. Shall they recover damages? They caused a suit to be instituted against the defendant for the whole tract, when but a small part of it belonged to them. Their evidence is so weak, as to their inheritance from the deceased child by the former marriage, that we should be obliged to nonsuit them, but for the verdict of a jury of the vicinage.

The evidence does not satisfy us, that the defendant knew, or believed, they had any rights to the land, when he purchased it from *Gorret*. The communication of *Duralde*, the notary, at the time of the sale, show no clear outstanding title to any part of it. The inheritance of the plaintiff and his son, through the deceased daughter, was not mentioned, much less explained, to the defendant. He took from *Gorret* a formal title to the whole land, and, in our opinion, possessed it in good faith, until the institution of this suit. We do not believe the land has been injured by the use and improvements of the defendant.

The defendant is entitled to warranty against *Cheri Gorret*, but not against the wife. He sold the land belonging to the plaintiffs, and which they are entitled to recover. She could not become security for, or warrant the lawful, much less the unlawful acts of her husband, and the bill of sale, so far as it tends to that effect, is invalid.

It is decreed, that the judgment of the district court be affirmed in favor of the plaintiffs, respectively, for four and three thirty-second parts of the tract of land claimed, with costs in the district court; that the judgment in favor of the intervenor, *Adeline Gorret*, for the twenty-five thirty-second parts of the land be reversed, and it is decreed, that she pay the costs of her intervention in the district court, and half the costs of this appeal. The judgment in favor of the plaintiffs, for damages, is also reversed, and they are condemned to pay half the costs of this appeal. It is further decreed, that *John Nolan*, the defendant, recover from *Cheri Laurent Gorret*, his warrantor, two hundred and ninety-three dollars, for the price paid by him for fourteen and two-thirds of an acre of ground, at twenty dollars an acre, of which he has been evicted, with legal interest, from this date until paid, and costs in the district court.

## MCDOWELL and PECK v. GENERAL MUTUAL INSURANCE CO.

A master, in entering a foreign port where pilots are usually employed, is bound to approach the pilot ground with caution, and to use reasonable diligence to obtain one. If he enters without a pilot, and the vessel grounds and is wrecked in doing so, the underwriters on ship are not answerable for the loss thereby sustained, unless it be shown that reasonable diligence to obtain a pilot was unsuccessfully exerted, or that circumstances of impending danger rendered it unsafe to wait for a pilot, or that such other state of facts existed as would reasonably excuse the omission, by showing its necessity.

The subject of employing a pilot falls under the head of seaworthiness; and that warranty is equally implied, whatever may be the subject of insurance. It applies no less to insurances effected by the owner of goods, than to those effected by the owners of the ship.

The English doctrine of seaworthiness is, that there is no implied warranty of seaworthiness, except at the commencement of the voyage. The law in the principal commercial States of this Union, is at variance with the English rule, gives a wider extent to the implied warranty, and holds it to be the duty of the assured to keep his vessel seaworthy during the voyage, if it be in his power to do so; and if, from the neglect of the owner, or his agents, the vessel becomes unseaworthy, by damage or loss in her hull or equipments during the voyage, the owner must repair the damage or supply the loss at the port of refuge, refreshment, or trade. The underwriter will be discharged from liability for any loss, the consequence of such want of diligence. The American doctrine is qualified to this extent: that unseaworthiness arising after the commencement of the voyage, has not a retrospective operation, so as to destroy a just claim in respect of losses which have occurred prior to the breach of the implied warranty; and also, that, if the ship sailed seaworthy for the voyage, subsequent unseaworthiness shall not operate as a defence, except where the loss is distinctly shown to have been occasioned by it, and the unseaworthiness itself to have arisen from the negligence or misconduct of the assured, or his agents.

A protest is an important instrument: and where a captain, having met with a disaster, prepares and signs one, while the circumstances are fresh in his memory, setting forth the manner of its occurrence; and afterwards, when a litigation, involving a charge of misconduct against himself, has arisen, attempts, as a witness, to account for the disaster by statements of very material incidents of his voyage undisclosed by the protest, his testimony must be viewed with grave distrust, and cannot be considered as satisfactorily verifying the circumstances of the loss.

After the vessel sails, I do not think the insurers of a cargo liable to lose their insurance, for the errors of judgment, mistakes, or even negligence, of the master. The general rule laid down by elementary writers, as Phillips, and even Chancellor Kent, that the failure to take on board a pilot, where it is customary, renders the vessel unseaworthy, and avoids the policy, must be subject, in practice, to this distinction in favor of the insurers of cargo who have no interest in the vessel, or it would be a most unreasonable rule. *Preston, J.* dissenting.

**A**PPPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Elmore and King*, for plaintiffs. *E. Briggs*, for defendants. By the court:

**SLIDELL, J.** This action is upon a policy of insurance for the value of goods shipped in the schooner *Maria*, on a voyage "from New Orleans to Brass river and about twelve miles above Columbia." The vessel was wrecked in crossing the bar at the mouth of that river. The defendants resist the payment of the loss, on the ground that it was occasioned by the neglect of the master to employ a pilot in crossing the bar.

There was judgment for the plaintiff in the court below, and the defendants have appealed.

We consider it as satisfactorily resulting from the evidence, that it is customary for vessels of the description of the *Maria*, to take a pilot in crossing the bar of the Brazos river; and the propriety of doing so is shown by the nature of the locality. It appears from the testimony, that there is a shifting bar and channel, and that it would not be safe to cross without a pilot. The absence of a pilot under such circumstances, must be considered as producing a positive and definite increase of risk.

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It may be considered as well settled in American jurisprudence, that a master, in entering a foreign port where pilots are usually employed, is bound to approach the pilot ground with caution, and to use reasonable diligence to obtain a pilot. If he enters without a pilot, and the vessel grounds and is wrecked in doing so, the underwriters on ship are not answerable for the loss thereby sustained, unless it be shown that the reasonable diligence to obtain a pilot was unsuccessfully exerted, or that circumstances of impending danger rendered it unsafe to wait for a pilot, or that such other state of facts existed as would reasonably excuse the omission, by showing its necessity. See *Bolton v. American Insurance Company*, cited in 3 Kent, in note page 76. Phillips on Insurance, p. 315. *Keeler v. Firemen's Insurance Company*, 3 Hill, 250. 2 Greenleaf's Evidence, § 400. *McMillen v. Union Insurance Company*, 1 Rice, 248, cited in note, Kent, *supra*. See also 3 Kent, 289, *Palapasco Insurance Company v. Coulter*, 3 Peters, 235.

That the question of liability of underwriters, in case of the omission to take a pilot, is the same, whether insurance be on the ship or goods laden on board by third persons, seems clear. The subject of employing a pilot appears properly to fall under the head of seaworthiness, and is so treated by the commentators. Now, it is settled, that the warranty of seaworthiness is equally implied, whatever may be the subject of insurance, and applies no less to insurances effected by the owner of goods, than to those effected by the owners of the ship. See *Oliver v. Cowley*, cited in Park, vol. 1, p. 298. *Ib.* 306. Arnould, 654. 1 Phillips, 308. See also *Taylor v. Lowell*, 3 Mass. 347.

The owners of the goods are not without recourse. They have their remedy, for the consequences of the captain's neglect to take a pilot, against him and the owners of the ship.

It is proper here to remark, that although it seems to be the great leading principle of the English doctrine of seaworthiness, that there is no implied warranty of seaworthiness, except at the commencement of the voyage, yet the law in the principal commercial States of this Union, is at variance with the English doctrine, and gives a wider extent to the implied warranty. It holds it to be the duty of the assured to keep his vessel seaworthy during the voyage, if it be in his power to do so; and if, from the neglect of the owner, or his agents, the vessel becomes unseaworthy, by damage or loss in her hull or equipments, during the voyage, the owner must repair the damage or supply the loss, at the port of refuge, refreshment, or trade. The underwriter will be discharged from liability for any loss, the consequence of such want of diligence. Kent, vol. 3, p. 288. *Ib.* 289. Arnould, 666.

The American doctrine, however, is qualified to this extent: that unseaworthiness, arising after the commencement of the voyage, has not a retrospective operation, so as to destroy a just claim in respect of losses which have occurred prior to the breach of the implied warranty; and also, that if the ship sailed seaworthy for the voyage, subsequent unseaworthiness shall not operate as a

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defence, except where the loss is distinctly shown to have been occasioned by it, and the unseaworthiness itself to have arisen from the negligence or misconduct of the assured or his agents. The language of Mr. Kent, with regard to this latter qualification, is very apposite, by reason of the illustration it gives, to the present controversy. "The owner," says he, "is bound to keep the vessel in a competent state of repair and equipment during the voyage, as far as it may be in his power. If this be not the case, and a loss afterwards happens, which could by any means be either increased or affected by a prior breach of the implied warranty of seaworthiness when the policy attached,—as, for instance, if the master should omit to take a pilot at an intermediate port, where he ought and might have done it, and the vessel be, two years afterwards, lost, by capture; or, if he sailed without sufficient anchors, and the vessel be afterwards struck with lightning,—would the insurer be discharged? The better opinion would seem to be, that he would not be discharged." 3 Kent, 289. See also *Paddeck v. Franklin Insurance Company*, 11 Pick. 227.

Mr. Arnould advocates the English rule, and considers it decidedly preferable, both as giving the assured a more complete indemnity, and also preventing many nice and difficult inquiries, which, in his opinion, the other system has a direct tendency to produce. But, it seems to us, on the other hand, that the American rule is more consistent with public policy, considered with reference to the preservation of life and property.

In the present case, the plaintiffs insist, that the captain did all he could to procure the services of a pilot; and in support of this proposition, they rely on the testimony of the captain, which is as follows:

On Tuesday, 30th April, 1850, at 5 o'clock, A. M., made Galveston Island, bearing Northwest. At 10 o'clock, A. M., made the mouth of the Brazos river. The bar, to appearance, was smooth, and, being abreast of it, (the bar,) hove the vessel to for a pilot, witness at the same time seeing the pilot boat making for his schooner. The pilot boat approached within hailing distance of the schooner, the schooner heading at that time to the South and West, the jib to windward and below her lee, and the pilot boat was on the same tack, at the stern of the schooner, gaining on her, when the pilot boat hailed the schooner and demanded if she wanted a pilot. Witness answered from the schooner, yes; what is the pilotage? They hailed again from the pilot boat, but witness could not hear distinctly what they said, but supposed it was to repeat the question, and witness returned the same answer. Whilst these questions were being propounded and answered, witness was standing by the lee main rigging, and having a man heaving the lead and reporting four fathoms of water. The pilot then bore away before the wind, and went on the opposite tack; and, as it is customary on the bar of Texas, for pilot boats to go in first, and for vessels to follow, I bore away after the pilot boat, and followed it for about half an hour; but not keeping up with the pilot boat, I set my signal for him to wait; but he not waiting, and the schooner not getting any farther off from the shore on this tack, witness put the schooner about and stood on the opposite tack. By putting the schooner about she dropped astern, and was in three fathoms of water before she got headway; and, whilst standing on this tack, she not being able to clear the South breakers, and her anchor and chains not being able to hold her, witness kept her away and attempted to cross the bar. This was the only alternative, either to cross the bar, or drift on the North or South breakers. It was then about 1 o'clock, P. M. when the schooner got on the bar, and she commenced thumping; and, the

wind being light and dying away, she lost her steerage way, and the current running very strong out of the river, swept the schooner on the Southwest point, &c.

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In addition to this testimony, the plaintiff also offered the testimony of one of the seamen, which substantially accords with the captain's. These depositions were taken before a justice of the peace, after the answer was filed in the cause.

If the case stood upon this testimony alone, we might have concurred with the district judge, in holding the defendants liable.

But, a grave difficulty is presented, by comparing the testimony of the captain and seaman, taken after the refusal of the underwriters to pay the loss, on account of the omission to employ a pilot, with the protest made in Texas, a few days after the wreck, and signed by them. This instrument relates, with the usual detail of a log book, from which it would seem to have been copied, the circumstances of the vessel's voyage from New Orleans to the coast of Texas, giving, day by day, the winds, soundings, weather, accidents occurring on board, &c. We then find the following statement: "Tuesday, 30th, at 5 o'clock, A. M., made Galveston Island, bearing North-West; at 10 A. M., made the mouth of the Brazos River, the bar to appearance was smooth, the wind fresh from the South-East; at one o'clock, P. M., bore away, and stood on to the bar; but while crossing it, the wind died away, and before the anchors could be let go, the current, which was then running six miles per hour, swept the schooner on to the South-West point, where she commenced thumping on the bottom very heavy; immediately got out the boat, and carried out the anchor; and, at 10 P. M. succeeded in bearing the schooner to the inner point (she thumping heavily all the time, and leaking badly), when the hawser parted, and she was again swept on the South point; it now required both pumps to keep her free; the wind light from the South-East, and continued so until midnight. Wednesday, May 1st, at 1, A. M., the wind began to increase; at 4, the wind still freshening; went on shore in the yawl, and borrowed an anchor from the schooner McNeil, and got the pilot boat and pilot's men, to assist in taking out the anchor, and to assist in heaving her off. At 5, returned to the schooner, and found she could not be kept free with both pumps, and that she had settled in the sand. Commenced heaving on the hawser, but found she did not move. At 8, A. M., she had gained on the pumps 2 feet water, and at 10, A. M., she settled down and soon filled to the deck, and became a total wreck; at which time, H. C. Wilcox, wreck-master, came off with two launches and twenty-two men, and began to strip the vessel and take out the cargo; two men would go under the water and hook on to articles, and the rest hoist them out, and took them on shore. The vessel was all the time gradually sinking, the wind continued fresh, and very little progress could be made in getting out the cargo. Thursday, May 2d, the schooner had sunk so, that the water was one foot on the deck. Worked all this day, but owing to the high sea, got out but little cargo. Friday, May 3d, at daylight went down to the wreck, found six feet water on the deck; we could get no more cargo out, and abandoned the vessel and cargo as it lay."

It will be observed that the protest is entirely silent, as to any attempt whatever, to get a pilot. No mention whatever is made of heaving to for a pilot, of speaking one, or even of having seen one, until many hours after the vessel had attempted to cross the bar, and was wrecked.

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A protest is a very important and solemn instrument. We have indeed no law such as is contained in the celebrated *Ordonnance de la Marine* of France, in her existing Code de Commerce; in the *Codigo di Comercio* of Spain, and the legislation of some other commercial nations, commanding captains of vessels to make protests or consulats; yet, it is a matter of commercial usage to make them. Although not receivable in our courts as evidence for the masters, his owners or shippers, credit is often given to their contents by merchants and underwriters. Such an instrument usually is, as Mr. Abbott observes, and as every merchant and captain knows, a narrative by the master of the particulars of the voyage, of the storms encountered, the accidents which may have occurred, and the conduct which, in cases of emergency, he had thought proper to pursue. "He should take care," says Mr. Abbott, "to supply from the log book, his own recollections, and that of the mate or trustworthy mariners, true and faithful instructions for its preparation."

When, therefore, a captain, having met with a disaster, prepares and signs a protest, while the circumstances are fresh in his memory, setting forth the manner of its occurrence, and afterwards, when a litigation involving a charge of misconduct against himself has arisen, attempts, as a witness, to account for the disaster, by statements of material incidents of his voyage, undisclosed by the protest, his testimony must be viewed with great distrust, and cannot be considered as satisfactorily verifying the circumstances of the loss.

In *Senat v. Porter*. 7 Term Rep., it was held, that the protest of the captain could be used to contradict his testimony.

Emerigon, who had not merely studied the law of insurance in books, but had a very large practical experience as an advocate and judge in the admiralty, says that a captain cannot impeach his own work, and say that he has betrayed the truth, or that he has not exhibited in his consulate all the important facts of the case. And, in another place, he observes: "Every captain who, having the power of making his consulate in due form, fails to do so, renders his conduct very suspicious." He cites the forcible language of Casaregis: *Ex qua omissione acti soliti, facili, et necessari, oritur suspicio et presumptio, quod pretensum damnum navis non acciderit ex dicta causa.*

We must not be surprised therefore, says Emerigon, at the judgments, which having regard to the circumstances of fact, have rested on the want of a consulate, to decide the cause in favor of the insurers. He then cites a case, which presents as regards the master's conduct, a very strong analogy to the one before us. A captain borrowed a sum on maritime loan, his voyage being for the coast of Italy, Naples, Corsica and Sardinia. He went to Tunis, where he made no consulate to show the necessity of his deviation. He there took on board a cargo of timber. He touched at Bastia, where he made a consulate, in which he said nothing as to the cause of his voyage to the Barbary coast. Having left Bastia he was wrecked. Arrived at Marseilles, he made a consulate, by which it was attested, that a storm had forced him to put into Tunis. The lenders objected that the consulate should have been made at Tunis. The decree, in spite of the shipwreck, condemned the captain to pay the sum received on maritime loan with the marine interest and land interest. See Emerigon (Meredith) p. 686 *et seq.*

Although in the tribunals of France, the rules of evidence, in matters of insurance, differ from our own, and the doctrines thus enunciated by Emerigon must therefore be considered with proper qualifications, their spirit commends itself to our reason, and may be invoked here in the investigation of truth.

It is therefore decreed, that the judgment of the district court be reversed, and that there be judgment of nonsuit, the plaintiff paying costs in both courts.

PRESTON, J., dissenting. The defence to this suit, on a policy of insurance on cargo, is that the loss claimed did not result from the perils insured against, but was caused by the willful neglect of the master to take a pilot on entering the Brazos River. This, it is contended on authority, rendered the vessel unseaworthy, and exonerated the underwriters.

The cause of the loss, as stated in the protest of the master and crew, evidently taken from the log book, was that the vessel attempted to cross the bar of the Brazos River under sail, but while crossing it the wind died away, and before the anchor could be let go, the current, which was running six miles an hour, swept the schooner on the Southwest point, where she commenced thumping; could not be got off, and sunk. The cargo, consisting of heavy machinery and brick, belonging to the plaintiffs, who were not owners of the vessel, was lost. The immediate cause of the loss was the dying away of the wind at the critical moment of crossing the bar, the rapidity of the current of the river over the bar forcing the vessel on a point where she thumped and sunk. These were perils of the sea insured against, and the loss must be borne by the insurers unless they can exonerate themselves from liability by the proof of facts having that effect. The burden is on them, and they undertake to show, that though the proximate causes of the loss were perils insured against, yet these were traceable to neglect and misconduct of the master in not having a pilot, where it was customary and necessary, thus rendering, in the language of books of authority, the vessel unseaworthy.

Now, the only two witnesses to the facts, which actually occurred, are the master and a seaman. Both state, that the master made all reasonable efforts to obtain a pilot, but without success. Their testimony, in this respect, is not in contradiction to the log-book and protest, but certainly makes additions to them, and is thereby, to some extent, impaired. Still the testimony is uncontradicted, while the defendants, by examining the pilots at the Brazos, could have entirely destroyed it if untrue. Being a question of fact, and with regard to which the district court gave full credence to the testimony of the witnesses, I think we should yield to his judgment as to the facts, and if so, to conclude that the loss was caused by *vis major*, the effect of force.

If we take it for granted that the log-book contains the whole of the facts, and that the master made no efforts to obtain a pilot, the case is still, in my judgment, on the meagre testimony before us, against the defendants. It is true three insurance officers, of New Orleans, have been examined in their behalf. Two were never at the Brazos, one has passed over the bar twice. They state that the bar is a shifting one, the channel changeable, that they do not consider it safe to attempt to cross without a pilot, and would not insure a vessel going to the port if it was understood that the captain was to be his own pilot. These are the opinions of witnesses who have no practical knowledge on the subject, for *Mr. Wilder* probably crossed the bar only as a passenger. They do not refer to the circumstances of this case. In it we are obliged to believe the master was a mariner by profession. It appears he was in command of a small schooner of fifty-five tons, which might have safely passed the bar, although a vessel of two hundred tons could not. The water on the bar was smooth and the wind fair. He was the owner of one-fourth of his vessel, and it was uninsured. Under such circumstances he attempted to cross the bar

**McDOWELL** himself. I cannot doubt that he exercised ordinary prudence, and that in the best exercise of his judgment he believed that he could cross the bar with his small schooner without a pilot, or he would not have risked his own property rather than pay three or four dollars pilotage.

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The defendants have offered no proof, but the event, to show an entire want of judgment in the master. Success is undoubtedly the best criterion by which to test the judgment of men in every thing, but it is not so invariably correct as to dispense with the proof of bad judgment in case of misfortune. For the want of ordinary care and prudence the master would, perhaps, have forfeited the insurance of his owners on the vessel. But, in my opinion, the shippers and insurers of cargo forfeit their insurance only by their own negligence, and not by negligence on behalf of the master. Thus, the plaintiffs shipped, and insured their property, on a vessel which, it is not disputed, was seaworthy and properly manned when she sailed. It was a sufficient compliance with their warranty as to the master, that he possessed a general good character for care and skill in his profession. Perhaps, as insurers of cargo only, and in the very port where the insurance company was established, even an inquiry as to the general good character and capacity of the master is immaterial, because the insurers are bound to a knowledge on these subjects as well as the insured, and in fact take care, by officers, to obtain the same knowledge with the assured. As to the latter, he often ships his freight on the vessel by the master named, or whoever may go as master. The strict scrutiny of this subject is not required, as there is not the slightest impeachment of the general character or capacity of the master at the commencement of the voyage. And it is to be presumed to have been good until the contrary is shown by evidence. As, therefore, it is to be taken for granted, in this case, that the master possessed a general good character for care and capacity, when the cargo was shipped, the shippers must be exonerated from negligence or want of prudence in shipping the cargo on board his vessel.

After the vessel sails, I do not think the insurers of a cargo liable to lose their insurance for the errors of judgment, mistakes, or even negligence of the master. The general rule laid down by elementary writers, as Phillips and even Chancellor Kent, that the failure to take on board a pilot, where it is customary, renders the vessel unseaworthy and avoids the policy, must be subject in practice to this distinction in favor of the insurers of cargo, who have no interest in the vessel, or it would be a most unreasonable rule.

Mr. Arnould states, that it is the rule in England that the assured warrants the vessel as being seaworthy at the commencement, and not during the voyage; but that it is settled in the United States that she must be kept seaworthy during the voyage, and thinks the English rule most eligible. As far as I can judge, there is some diversity of decisions in both countries, growing out of the extremely varying circumstances of particular cases. And, perhaps, the real error consists in elementary writers classing together cases and things that are dissimilar, and attempting to subject them to a general rule.

Thus, the unseaworthiness of a vessel, and the neglect to employ a pilot, are two different things, and not necessarily subject to the same general rule as to their effect upon insurance. The neglect of the master to employ a pilot, seems more assimilated to the neglect to set the proper sails, or to steer the right course, or to keep the necessary watch, or cast anchor when approaching breakers.



Now, for all losses, the proximate cause of which is one of the enumerated risks, although remotely caused by negligence or unskillfulness of this character, it has over and over again been decided in England that the underwriters are responsible. The maxim *causa proxima non remota spectatur*, invariably governs. *Bush v. The Royal Exchange Company*, 2 Barnwell and Alderson's Rep. 73. *Walker v. —*, 5 Ib. 173. *Bush v. Poulland*, Barn and Cresswell Rep. 219. And in this country the Supreme Court of the United States have fully adopted the same doctrine in three cases.

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In the case of the *Patapasco Insurance Company v. Coulter*, I consider analogous in facts and principle to the case under consideration. The insurance was upon a cargo of flour, from Philadelphia to Gibraltar. The vessel was burnt by the negligence or carelessness of the master, in Gibraltar, and the cargo was lost. The Supreme Court of the United States, in so many terms, decided that the underwriters were not discharged, it being admitted that the loss of the flour was caused by the negligence or carelessness of the master. *The Patapasco Insurance Company v. Coulter*, 3 Peters, 222. *The Columbia Insurance Company of Alexandria v. Lawrence*, 10 Peters, 507. *Waters v. The Merchants' Louisville Insurance Company*, 1 Peters, 225.

This last case was a river risk, upon a steamboat, but declared by the court to be assimilated to and governed by principles applicable to marine risks. The court, after an elaborate opinion, came to the conclusion that the policy covers a loss of the boat by fire, caused by the negligence, carelessness or unskillfulness of the master and crew of the boat, or any of them, and that pleas to the effect that the fire by which the boat was lost, was caused by the carelessness, neglect or unskillful conduct of the master and crew of the boat, was not a defence to the action, by the owners on the policy, or sufficient in law to bar their recovery of the loss. The whole scope of the opinion goes as far as any English decision, and further than I should be willing to go, for in effect the owners of the boat were indemnified for a loss caused by their own agents, and consequently by themselves.

It is by no means necessary to go so far as the Supreme Court of the United States have gone in this case, to support the claim of the assured in the case under consideration. They insured cargo, not on their own vessel. It is alleged to have been lost by the neglect and carelessness not of their agents, but of the master of a vessel which did not belong to them, and who was not under their control. His general character for care and skill is not attacked. At most, as has been seen, his general character is all that could be expected from the assured or that he bound himself to warrant, and not all the particular acts of the master on consequences of his omissions.

The fact that barratry is generally excepted from the risks insured when the assured is an owner of the vessel, though not excepted when he is not an owner, shows by analogy that there should be a distinction between the liability of the insurer for the negligence or unskillfulness of the master as to the loss of the vessel, and the loss of the cargo. As to the latter, it appears to me nothing but a general character, at the shipping port, for negligence and unskillfulness, and that unknown to the insurers should exonerate them.

There is another consideration in this case which is conclusive to my mind. By the very terms of the policy, the plaintiffs are insured against the barratry of the master. Surely, since the parties by express contract, agreed to insurance against the crimes of the master, they, by implied contract, intended

**McDOWELL** insurance against his particular acts of negligence or unskillfulness. Such an  
**GENERAL MU.** implied agreement has been inferred, from insurance against barratry, in several  
**TUAL INS. CO.** decisions.

In the case of *Lowe v. Hollinsworth*, on which the defendants principally rely, it is probable the insured were owners of both ship and cargo, and if so, the master was agent of both. He violated a statute of George III, which expressly required that vessels should be navigated on the river Thames, under the direction of a competent pilot, because, as declared by the statute, the navigation was intricate and dangerous. No discretion was left to the master, and his employers were condemned to bear the consequences of his violation of law. So in the other case relied upon, of *Stanwood v. Rich*, the insurance was on the vessel, and Chief Justice Parker left it to the jury to decide whether the failure of the master to take a pilot, in the harbor of Boston, was such negligence as would discharge the underwriters. He did not, indeed, put their discharge on the ground that he was the agent of the insured, and that, therefore, the principals must suffer for the negligence of their agent; but it appears to me this was the true ground. I can see no more reason for discharging the underwriters from insurance on cargo on account of the negligence of the master, than for discharging the insurance on the stock of a store, on account of the negligence of the owner of the house, which caused the fire and loss, and *vice versa*.

For these reasons, I think the judgment of the district court should be affirmed.

Application for re-hearing refused.

## HEIRS OF S. HENDERSON v. P. A. ROST and J. MONTGOMERY.

In the will of the testator there was the following clause: "Two thousand dollars per annum to be paid to the poor of the town of Dunblane, in Perthshire, North Britain. This sum to be divided by the resident minister of the Presbyterian church, and the two highest civil officers in the town, to be paid upon due proof of the acceptance of the trust, say \$2000. Two thousand dollars for the erection of a school-house, in the town of Dunblane, for ten years only, and for the purpose of educating the poor, this being the place of my birth." There were no officers, or persons, who, in any legal or judicial sense, would answer the description of the two highest civil officers, in the town of Dunblane. In the courts of Scotland, the legacy would not be sustained, but would be held as lapsed, from uncertainty and the want of proper persons qualified to accept the same. By the Court: It seems, therefore, that as no action can be maintained against the executors, for the recovery of this legacy, they are not authorized to retain the funds of the succession, for the purpose of paying it.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge*, J. *E. Briggs*, for plaintiffs. *P. Soule*, for defendants. By the court: (Rost, J. declined sitting.)

**EUSTIS**, C. J. *Stephen Henderson* died in New Orleans, in March, 1838, leaving two wills, which were admitted to probate. The heirs at law of the estate were: 1st, *Thomas and Jean Henderson*, the only children of *Patrick & Peter Henderson*, deceased, the eldest brother of the testator. 2d. *Ann Henderson*, his sister. 3d. *John Henderson*, his brother. The interest of the heirs of *Peter Henderson*, was extinguished by a compromise, dated on the 17th of April, 1839. They were not mentioned in the will. The interests of the other

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two branches, who, under the will, would have been entitled to claim certain legacies, were settled by an agreement, allotting one fourth part of the succession to each of the following parties, viz : One-fourth to *Ann Henderson*, one-fourth part to *John Henderson*, one-fourth part to *Stephen Henderson, Junior*, and one-fourth part to *George Henderson* and *Caroline Eugenie Henderson*, wife of *Whitman Willcox*, who, as well as *Stephen Henderson, Jr.*, were the children of *John Henderson*, by his first marriage. Of these, all are now living, except *John*, who died, leaving, by a second marriage, *John, George, Helen*, and *Jean Henderson*, who are parties to this suit, by the trustees and executors of their father's will.

A suit had been instituted, by *Thomas Henderson* and *Jean Henderson*, the heirs of *Peter Henderson*, to set aside the provisions of the wills of the testator, which was terminated by the compromise before spoken of. The donations in favor of the general charitable institutions, were satisfied by transfers of property in the city, and the residue of the property of the succession was disposed of. The *Forest* plantation, and the slaves attached to it, were transferred to *George* and *Caroline Engenie Henderson*, wife of *Whitman Willcox*, and the *Elm Park* plantation and its slaves to *Stephen Henderson*. The *Destrehan* plantation and its slaves were sold to *P. A. Rost*, and the undivided half of the *Mount Houmas* plantation was sold to the owner of the other half, *Henry Doyal*. It is not necessary to note the various agreements of the parties, relating to this settlement, it is sufficient, for the present inquiries, to state, that the slaves and plantations were sold together, under an obligation of the parties acquiring them, to comply with the provisions of the will, in relation to the slaves, if the same should be adjudged to be valid, and to be carried into execution.

The wills of the testator are published in full, in the report of the case, in which the court determined certain testamentary dispositions to be invalid. 5 Ann. 458, *et seq.*

This appeal is taken by the plaintiffs, who are the heirs of the late *Stephen Henderson*, from a judgment of the Court of the Fourth District of New Orleans, by which their petition was dismissed, with costs.

The suit was instituted for the purpose of compelling the defendants, who are the executors of the testator, to account for, and to pay over to them, their several shares of the assets of the succession. The defendants insist on their right to retain certain funds, for the purpose of carrying into effect the testamentary dispositions of the testator, and ask such a decree from the court as will enable them to liquidate the succession under their charge.

The case was before the court in May term, 1850, and certain articles of the will were declared void and of no effect. It is reported in 5 Ann. 467. One of the questions upon which the opinion of the court was reserved, related to the liberation of the slaves of the testator; that, and the one relating to the legacy in favor of the poor of the town of *Dunblane*, in *Perthshire*, in *Scotland*, have been argued at bar. The judgment in the court below, seems to have been *pro forma* merely; the argument before us, has been very thorough, and well prepared.

The questions concerning the condition and liberation of the slaves having been reserved for consideration, it only remains for us to consider the validity of the legacy in favor of the poor of the town of *Dunblane*.

It is in these words : " Two thousand dollars per annum to be paid to the poor of the town of *Dunblane*, in *Perthshire*, North Britain. This sum to be

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divided, by the resident minister of the Presbyterian church and the two highest civil officers in the town; to be paid upon due proof of their acceptance of the trust, say \$2000. Two thousand dollars for the erection of a school house in the town of Dunblane, for ten years only, and for the purpose of educating the poor, this being the place of my birth."

We have been favored with the depositions of two witnesses, in relation to this legacy, which, as matters of legal learning of the law of Scotland, we should be glad to give entire, but the length to which the opinions in this case have already been extended, prevents it. The witnesses, *Allen Alexander Macnechie, Esq.*, member of the Faculty of Advocates and Professor of the Roman law in the University of Glasgow, and *John Watkins, Esq.*, of Glasgow, one of the writers of her Majesty's signet. The result of their testimony appears to be this:

The town of Dunblane is not an incorporated town; it has no corporative powers, privileges, or establishment, but is, and has been, since the passage of the jurisdiction act of George II., as it is called, a mere village in the Barony of Cranlix and Dunblane, and county of Perth, since which time the town, as part of the county of Perth, has been under the ordinary jurisdiction of the Queen's courts. The hereditary office of Bailie, of the Regality of Dunblane, with the jurisdiction and powers anciently appertaining thereto, was abolished by the act of Parliament referred to, and there are no officers or persons who, in any legal or judicial sense, would answer the description of the two highest civil officers in the town of Dunblane. There is a resident minister, who resides in his manse, situated on the glebe, in or near that town, and who is minister of the parish of Dunblane, of which the town of Dunblane forms only a small portion.

In the interrogatories and answers, the terms used are, the two highest civil officers of the town of Dunblane. The word "in" is made use of in the will, instead of "of the town." But we think the difference, in this respect, is merely verbal, and that the true meaning of the will is, "officers of the town." Under the circumstances, we can only consider it as applying to persons in the condition of magistrates, belonging to the town of Dunblane. Although there may happen to be justices of the peace, or one of the sheriff's substitutes, residing within the town, yet they would no more answer the description than any other of the justices or sheriffs' substitutes of the county of Perth.

These two learned gentlemen, whose opinions appear to have been prepared with great care and research, concur in stating that, in the courts of Scotland, the legacy in question would not be sustained, but would be held as lapsed, from uncertainty and the want of proper persons qualified to accept the same. They also concur in stating that, although the town of Dunblane should be incorporated by act of Parliament, and thus, for the future rendered capable of receiving such a bequest as the present, it would be deemed unconstitutional, and against all precedent of the rules and practice of Parliament to pass any act having a retroactive effect, or affecting the rights of parties in impending suits or litigations; and thus there is no means by which the deficiency of the want of authority to accept this legacy can be supplied.

It is further in evidence, that there has been no demand ever made on the executors, by any person, for these legacies, and no notice has been given that they would ever be claimed; and it is not pretended that executors intend, or have ever attempted, to carry into effect any part of this legacy, of themselves

and as trustees under the will. One of them, *Judge Rost*, in the summer of 1838, repaired to Scotland, on business of the succession, and had an interview with the *Rev. John Grierson*, the resident minister at Dunblane. That respectable gentleman then stated to the executor, that he was already informed of the dispositions of *Mr. Henderson's* will, in favor of the town and the poor of Dunblane; that there were no civil officers of that town having capacity to receive those legacies; that the town of Dunblane was unincorporated, and had no jurisdiction separate from that of the county of Perth; that the town of Dunblane could not be benefited by the legacy, and that the inhabitants thereof were opposed to receiving it; that, under the law of Scotland, the heritors of the county of Perth were bound to tax themselves annually for the support of the poor of the county; that the inhabitants of the town of Dunblane had no interest in relieving them from that tax; that, as long as matters stood on their present footing, the heritors would take good care to provide for none but the poor of the county; that if a large fund was created in Dunblane for the support of the poor, that town would become the receptacle of the poor of all the neighboring counties.

It seems, therefore, that as no action can be maintained against the executors for the recovery of this legacy, they are not authorized to retain the funds of the succession, for the purpose of paying it.

Decree accordingly.

NOTE.—The following memorandum was endorsed on the record: "The opinions of *Jutices Stidell* and *Preston*, having no relation to the matter decided, to wit, the Dunblane legacies, will not be reported; the matters to which those opinions relate, being reserved by the decree for the further consideration of the court."

GEORGE EUSTIS, C. J.

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### CASES NOT REPORTED.

NOTE.—Cases not Reported by Mr. KING.

Succession of Mrs. Dorsey  
Kellar v. Merchants' Insurance Company  
Eagle v. Tardos  
O'Leary v. Sloo  
Packwood v. White  
Collins and Bruff v. Duffy  
Livingston v. Bercier & Co.  
Succession of Milne  
Carneal v. Smith  
Ledda v. Eagan  
Mullen v. Keating et al.  
Delacroix v. Nolan  
Sejourner v. Cain  
Bland v. Davis et al.  
Succession of N. N. Jones  
Oliver v. Oliver & Co.  
Carrollton Bank v. Patton and Benjamin  
Bass v. Curry, Hood and Larche  
Beasley v. Canady  
Sharp v. Mann  
Bacon, use of Stokes, v. Wiggins  
Gibson v. Owen  
Succession of Pace  
Wilson v. Goodrich  
Succession of Ramagossa  
Leftwich v. Leftwich

Luthon v. Gatewood  
Pellerin v. Levois et al.  
Rice v. Estes  
Wightman v. Woods  
Ewing and Beatty v. Polk  
Dalleres v. Landry  
Collins v. Pellerin  
O'Brien v. Mashet  
Whitlock v. Barrow  
Picou v. Valet  
McCall v. Landry  
McCall v. Rodriguez  
Berger and Brown v. Aycock  
Granger v. Williams  
Stewart v. Bird  
Decoux v. Douner  
Collins v. Harbour  
Foley & Co. v. Ellis  
Rogers & Co. v. Crescent Mutual Insurance Company  
Rogers & Co. v. Nashville Marine and Fire Insurance Company  
Bickel et al. v. 1300 bbls. flour  
Shiff v. Antoine  
Uzereau v. Mignolet  
Stiles v. Cook.

## Cases not reported by the present Reporter.

Corporation of Bayou Sara v. T. McCrindle  
 Bartlet Smith v. Aaron and Moses McWaters,  
 Per PRESTON, J. For the reasons given in  
 the case of *Stephen P. Smith* against the  
 same defendants, judgment is affirmed, with  
 costs.  
*Josephine H. Armour, Executrix, v. Bedford*  
*and Downs*  
*Municipality No. Two v. Collins, Blanc and*  
*Leverich*  
*William O. Glass v. John B. Dicks. Fowler*  
*and Dicks intervenors*  
*Pike and Hart v. O. C. Vantandingham*  
*Cyrus Battiff v. Joseph A. Paterson*  
*John Hill & Co. v. James H. Dakin*  
*Townsend and Milliken v. Charles H. Miller*  
*and wife*  
*Perkins, Warren & Co. v. Charles H. Miller*  
*S. M. Todd & Co. v. L. H. Place*  
*David T. Francis v. J. W. P. McGimpsey*  
*Mouler and Candel v. M. Carel*  
*Joseph P. Finney v. Nashville Marine and*  
*Fire Insurance Company*  
*William Harding v. C. J. Balbiani*  
*William Brooke v. Staanton & Co.*  
*Charles McMicken v. Maxent et al.*  
*Lewis W. Broadwell v. J. C. Bentley*  
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## ACCOUNT.

When an account has been stated and a balance ascertained, and the account in this condition is presented to the debtor, and he acknowledges its correctness, the creditor may recover the balance of account without producing accommodation acceptances, notes, &c., the payment of which forms items of the account.

*Oakey v. Weil*, 169.

## ACTION.

1. A petitory action for land, can only be maintained against the possessor or owner. C. P., art. 43, *Peck v. Overton*, 70.
2. A personal action must be brought in the parish in which the defendant resides. *Ibid.*
3. No action can be maintained against the heirs of a deceased person, upon the promise of the deceased person to take charge of the plaintiff, to educate her, to settle her in life, and to give her the bulk of her estate, at her death; even where the deceased had made a will in favor of the plaintiff, which was adjudged to be void from defects of form. Such a promise by the deceased would be void for uncertainty, and being in the nature of donations *mortis causa*, will be considered as revoked, unless embodied in a valid will. *Grice v. Pearson et al.*, 94.
4. A father, acting in the capacity of tutor to his minor children, is the representative of the succession of their mother, and as such, the proper party to be sued for a debt for which she was liable. *Mongel v. Penny*, 134.
5. A person who makes and sells a machine in violation of the rights of the patentee, cannot maintain an action to recover the unpaid purchase money. Nor can the purchaser, who has been prevented by the patentee from using the machine, recover from the vendor the purchase money, where, from the circumstances, he should have known that the vendor had no right to sell. *Bell v. Widow Bouney*, 170.
6. Where a creditor, on his own responsibility, and at his own cost, prosecutes an action to avoid a fraudulent sale made by an insolvent, the benefit resulting from the action cannot be claimed by the syndic who is no party to it. It inures entirely to the creditor, by whose vigilance it was obtained. *Townsend v. Miller*, 632.
7. A creditor, holding a joint note, may have it placed on the tableau of distribution of one of the debtors, without citing the other joint debtor. *Matter of O'Flaherty*, 640.

For Action on Administrators' Bonds—See *Phelps v. Sawyer* 551.

ADMINISTRATION and ADMINISTRATOR.

1. The administrator of an estate owes interest, by operation of law, to the heirs from the time of the settlement of his account, and will be condemned by the court to pay it, although not prayed for in the petition. *C. P. 1007.* *Graves v. Barnes*, 69.
2. A, who had a son by a former marriage, married B, by whom also he had a child; both A and B died. C, the brother of B, obtained administration on both successions; the child of B dying, the tutor of the child, by the former marriage, sought to annul the letters of administration of C, and obtain them for himself. *Held*: B left a child, the issue of her marriage with A; the subsequent death of that child, cannot render the administration of C illegal. *Rogers v. Walker*, 183.
3. An executor, who is the debtor of the succession on account of the purchase of productive property from the testator, owes legal interest on the installments from their maturity. But his failure to pay the debt, which he owes, does not subject him to the penalties of the law for not keeping the funds of the succession in a bank. *Heirs of Sharp v. Kleinpeter*, 264.
4. The executor is not bound to deposit in bank the government stocks, nor the bills receivable, of the succession which he administers. *Peale v. White*, 449.
5. The money of the succession was inconsiderable, being not more than enough to pay expenses. The failure of the executor under these circumstances to deposit it in bank, is not a sufficient ground for removing him. *Ibid.*
6. If a son, on the death of his father, takes possession of his property and treat it as his own, without any letters of administration obtained, and judicial proceedings had, he will, under our laws, be held responsible to creditors. *Stephenson v. Wilson*, 553.
7. It is apprehended, that the law is the same in Arkansas. *Ibid.*

For suit on Administrators' Bonds—See *Hill v. Snyder*, 557.

See EXECUTORS.

ANTICHRESIS.

1. A creditor, under an act of antichresis, is bound to make useful and necessary repairs of the pledged estate. But he will not be permitted to make improvements of a new, unusual and expensive character. If he do, he cannot insist on being reimbursed the amount which these improvements may have cost, but only their actual value to the estate. The consent of the debtor to improvements of the latter description, estop him from complaint. *Pickersgill v. Brown*, 298.
2. If a debtor, who is secured by antichresis, agree with his creditor to appropriate the revenues in a manner different from that prescribed in the act, by which the antichresis was created, a mortgage creditor, who has not put his mortgage in action, cannot complain. *Ibid.*
3. The creditor who takes property by an act of antichresis, is bound, unless the contrary be agreed, to pay the taxes as well as the annual charges of the property, which has been given to him in pledge; he is bound to



ANTICHRESIS (*Continued*).

provide for the keeping and useful and necessary repairs of the pledged estate, and also for the maintenance of the slaves.

*Garcia v. Garcia*, 526.

4. It is of the essence of the contract of antichresis as of all contracts of pledge, that the creditors be put in actual possession of the property which it affects. *Ibid.*

5. An antichresis, to be binding upon the property pledged, must be reduced to writing in accordance with article 3143 of the Civil Code.

*Smith v. Tabor*, 582.

APPEAL.

1. Where the appellant abandons his appeal, the appellee may bring up the record and have the judgment affirmed, with damages.

*Hohl v. Meyer*, 18.

2. Where in the distribution of a fund in the sheriff's hands, to which various persons set up claims, one of the creditors, for a sum over three hundred dollars, appeals solely from a judgment allowing another creditor two hundred and eighty-six dollars, the appeal will be dismissed, upon the ground that the appeal is for a sum below the jurisdiction of the Supreme Court. No one but the appellee can join in the appeal.

*Gauche v. Troutman*, 18.

3. The judgment homologating a sale under a monition, may be appealed from, even where the appellant did not appear or show cause in answer to the monition.

*Moore v. Knapp*, 21.

4. Where the matter in dispute, at the institution of the suit, does not exceed three hundred dollars, the case is not appealable to the Supreme Court, although the plaintiff may pray for interest from judicial demand.

*Owen v. Boyd*, 109.

5. The Supreme Court has appellate jurisdiction in criminal cases, only where the punishment of death or hard labor in the penitentiary may be inflicted.

*State v. Featherston*, 109.

6. The district court refused to homologate an award, and referred it back to the arbitrators. *Held*: The judgment is not final, and there can be no appeal.

*Bird v. Laysock*, 171.

7. A judgment, overruling an exception taken to the plaintiff's petition, on the ground of its insufficiency to authorize the injunction he had obtained, is not final, may ultimately work no injury, and is therefore unappealable.

*Huntington v. The Sheriff of Jefferson*, 205.

8. Where an appeal has been granted, on motion in open court, at the same term at which the judgment was rendered, no citation of appeal is necessary.

*Thompson v. Chapman*, 257.

9. Where the clerk's certificate is defective, and no fault can be imputed to the appellant, the Supreme Court will, on affidavit, grant time to correct the certificate.

*Ibid.*

10. Where the clerk's certificate shows that the record does not contain all the evidence in the suit, the appeal will be dismissed.

*Gilloutet v. Marcelin*, 442.

11. Where there is no real foundation for a claim over three hundred dollars, nor any legal ground for supposing such an amount can be recovered, the appeal will be dismissed.

*King v. Reed*, 492.

APPEAL (*Continued*).

12. A motion to dismiss an appeal, on the ground that a judgment ordering a partition in kind is an interlocutory decree, will not be maintained. By the Court: We understand this to be a contestation as to the manner of effecting a partition; and that, as such, it must be determined by the court, before proceeding further, under a provision of the code. Art 1270. If the appellants had gone on with the partition and executed the decree by drawing lots, they could no longer be relieved by it.  
*Blanchard v. Blanchard*, 529.
13. This court cannot, upon an appeal, reëxamine the decision of a district judge upon a question of fact, such as whether due diligence has been used to procure the attendance of a witness. *State v. White*, 531.
14. Appeal dismissed, because the record was defective, containing no final nor interlocutory decree, upon which the court was authorized to act.  
*State v. Tucker*, 551.
15. The statute of 1846 (p. 335 of the Revised Statutes) gives to the Supreme Court jurisdiction of an appeal in criminal cases, from final judgments alone, returnable as in civil suits, and requires the clerk of the court granting the appeal, to make out the transcript, as in civil cases. *Ibid*.
16. A party who gives no appeal bond, cannot be heard as an appellant, without the consent of the appellee. *Baldree v. Davenport*, 589.
17. This suit was brought by a father as tutor of his minor child, who was the real plaintiff. Pending the appeal, the child died. The father suggested the death, and asked to be made a party to the suit in his own right. *Held*: That there was evidence in the record that the father was the only heir at law, and therefore entitled to prosecute the appeal in his own right. *Waddil v. Thompson*, 592.
18. A person whose property has been sold without his consent, may appeal from a decision affecting the property, although no party to the suit, under art. C. P. 571.  
*Pillot v. Cooper*, 656.

Defendant who executes the judgment, abandons his appeal.

See *Fluhart v. Golding*, 231.

## ARBITRATION.

The court will not set aside an award, upon the allegation, that the amicable compounders misconstrued the deposition of a witness, particularly where the party opposing the award had submitted the deposition, for it was his fault, that he did not obtain more explicit testimony from the witness. Nor will the award be interfered with, on the ground that one of the compounders had in his possession vouchers which would have benefited the party opposing the award, where those vouchers had been received by the referee, in the course of his business, before the submission; for a party cannot complain, that the referees did not act upon testimony not submitted to them. *Bird v. Laycock*, 171.

## ARREST.

1. The act of 15th of March, 1847, which declares, that no citizen of another State shall hereafter be arrested in this State, at the suit of a resident or non-resident creditor, except in cases where it shall be made to appear, by the oath of the creditor, that the debtor has absconded from his residence, applies to the citizens of the States of this Union only—not to the citizens of foreign States, or countries. *Canal Bank v. Schroeder*, 615.

ARREST (*Continued*).

2. An arrest will lie for damages for any injury sustained by the plaintiff, either in his person or property. *Wilder v. Brush*, 657.

ATTACHMENT.

1. The law gives an attaching creditor the right of being paid, by preference, over other ordinary creditors, out of the proceeds of the property attached, and this right cannot be defeated by a subsequent seizure on execution. *Beck v. Brady*, 1.
2. An attachment creates no privilege against the succession, where the debtor subsequently dies in this State, and his estate is administered upon here, as the place of his residence. *Collins v. Duffy*, 39.
3. A sale will not defeat an attachment which is levied before delivery. *Judson v. Lewis, Sheriff, et al.*, 55.
4. The plaintiff brought suit against the sheriff for a trespass, in levying certain attachments against a third person, upon his property. The sheriff called the attaching creditors in warranty. The plaintiff had purchased the property of the debtor. *Held*: That, as the attachments were levied before the delivery of the property to the plaintiff, he had no right to obstruct or embarrass, the process of the court against the debtor. *Ibid*.
5. The curator of a surety on a bond to release property which has been attached, cannot maintain attachment against the principal on the bond, unless the surety has made a payment. *Bannon v. Barnett*, 105.
6. Money was deposited with *Purvis, Wood & Co.*, for *Breed*: *Breed* sued to recover it, and *P., W. & Co.* plead a debt due them by *Breed*, in compensation. The plea was overruled. *Breed* had judgment. *P., W. & Co.* then paid the money into the hands of the sheriff, and immediately attached it. *Held*: That the attachment did not lie. *Purvis v. Breed*, 636.
7. The plaintiff obtained an attachment against the defendant, but the sheriff did not take actual possession of the property under the writ, and no act of possession by him or his successors is shown, for five years after its return. About five years after that time, the attaching creditor had a curator *ad hoc* appointed to defendant, obtained judgment, and seized the lots under an execution. In the meantime, and within two years from the date of the attachment, defendant sold the property, and it passed into the hands of purchasers who were ignorant of the attachment. *Held*: The law required that the sheriff should have seized and detained the property; that he and his successors should have taken charge and kept possession of it; and for the failure of *Goodrich*, the attaching creditor, to have seen this done, and to have prosecuted his suit with diligence, innocent purchasers of the property should not suffer. *Goodrich v. Pattingill*, 664.
8. Sheriffs must seize actually, and not fictitiously, where the law requires; and third persons must not suffer by their neglect to do so. *Ibid*.
9. Defendant may appear by counsel, or otherwise, to obtain the release of property attached, for any irregularities in issuing the attachment, or because the property was not liable to attachment, and, if released, from such causes, the defendant would no longer be in court, by his property, or person. *Kendall v. Brown*, 668.

ATTACHMENT (*Continued*).

10. But, when a defendant in attachment appears by an agent, and bonds the property attached, the agent will be considered as representing his principal, so as to bind him to comply with the conditions of the bond, the essential condition of which is to defend the suit, or abide by the judgment that may be rendered. And it is not necessary, in such cases, to appoint an attorney to represent the absent defendant. *Ibid.*

For Conflict between consignee, bound to appropriate proceeds under a contract, and attaching creditor—See *Hopkins v. Pratt*, 336.

## ATTORNEY AT LAW.

1. An agreement, in writing, made by an attorney conducting a cause, and within the scope of his authority, is binding upon his client, although the counsel may be changed. *Calmes v. Stone*, 133.
2. This suit was brought upon two notes. The defence was prescription. The only evidence of an interruption of prescription, was the testimony of plaintiff's attorney, in whose hands the notes were placed before maturity. A bill of exceptions was taken to the testimony. By the Court: Attorneys at law are not agents, and the rule which admits the testimony of agents in favor of their principals, in cases like this, should not be extended to them. If it was, this case would not come within the spirit and reason of the rule. There is no absolute necessity for resorting to this evidence, as the same facts might have been proved by an appeal to the conscience of the defendant. *Madden v. Farmer*, 580.
3. The court will not recognize the principle, that the testimony of an attorney in behalf of his client, makes full proof of the fact sworn to, particularly in cases where the attorney would be personally responsible, if the action was not sustained. That evidence has always been held, as being of an inferior kind. *Ibid.*

## AVERAGE.

Where goods are sold by the captain, in order to obtain funds for repairing particular average losses, or for defraying the ordinary expenses of navigation, the loss arising from their sale must be made good by the ship-owner alone. Where, on the other hand, they are sold for the purpose of defraying expenses or repairing losses, which are themselves of the nature of general average, the loss arising from their sale, gives a claim to general average contribution.

*Hassam v. St. Louis Perpetual Insurance*, 11.

## BAIL AND BAIL BONDS.

1. *Charles Ford* gave a bond, with *James Cassidy* as his surety, in the sum of \$1000, conditioned, that he should appear before the First District Court, to answer a charge of larceny, and not depart without leave of the court. The clerk issued a notice, stating that, on a certain day, the party to the appearance bond was called, but failed to appear; that the surety was called upon to produce him, but failed to do so; that the bond was therefore forfeited, and judgment entered against the surety. It was held, that this was a sufficient notice, under the act of the 11th of March, 1837. *State v. Cassidy*, 273.

BAIL AND BAIL BONDS (*Continued*).

2. The party to such a bond should, if there be legal grounds, make an application to the court to set aside the judgment rendered upon it, within ten days after the notification thereof. If such application be overruled, he is allowed ten days, from the judgment overruling his application, for a suspensive appeal; and if he make no such application, he is allowed a suspensive appeal within ten days from the notification of the judgment. If no such appeal be taken within the periods stated, he is entitled to a devolutive appeal only. *Ibid.*
3. Although the statute provides, as the condition of the bond, that the accused shall appear, yet that means an effectual appearance, that is, that the party shall remain and submit to trial. Where, therefore, the bond which the accused and his surety signed, expressed on its face, that the accused shall be and appear before the First District Court of New Orleans, and not depart thence without leave of the court, to answer to the complaint brought against him for larceny, it was held, that such a condition was not more onerous than that which the spirit of the statute imposed. *Ibid.*
4. *Garland* was arrested. He was released on giving a bail bond, with *Beach* as his security, conditioned that he should not depart from the State for the term of three months, without leave from the court. *Garland* left the State without the leave of the court and within the term, but returned shortly after its expiration. The question was, whether the surety was bound. *Fonda v. Beach*, 213.
5. *PRESTON, J.*, held, that the surety was discharged, on the ground that the bond was not intended to prevent a temporary absence, but a permanent departure by the debtor, without making a surrender of his property. *SLIDELL, J.*, concurred in the decree of *PRESTON, J.* *Ibid.*
6. *EUSTIS, C. J.*, with whom *ROST, J.*, concurred, held, the surety was bound, the condition of the bond being broken. *Ibid.*
7. A surety on such a bond, after its condition has been broken, and after judgment rendered against the principal, cannot be allowed to falsify the affidavit under which the proceedings were instituted. *Ibid.*
8. The prisoner applied to the Supreme Court for a writ of *habeas corpus*, on the ground that there was no prospect whatever of having his appeal tried during the present term of the court, or earlier than the November term thereof. The court directed an immediate trial, and held, that writs of *habeas corpus* are undoubtedly matters of right; but courts and judges are bound to do, in relation to them, what is right between the prisoner and the public. The prisoner ought not to be bailed, on the ground that he cannot have an immediate trial, when the court is ready and willing to afford him that remedy. *State v. Roger*, 382.
9. The act of March 11th, 1837, which points out the manner of proceeding against the parties to bail bonds in criminal cases, assumes that the bond is authentic, and thereby dispenses with proof its execution. *State v. Lewis*, 540.
10. The act itself directs judgment to be entered against the parties to such bonds *in solido*. *Ibid.*
11. Where the sheriff's certificate is silent as to the date when he received and accepted the bail bond given under this act, it will be presumed that

BAIL AND BAIL BONDS (*Continued*).

such acceptance was after he had been authorized to do so by the committing magistrate. *Ibid.*

For Party Entitled to Bail—See *Ex parte Longworth*, 247.

## BANKS.

1. It was competent for the State to make such changes in the mode of administration of the insolvent banks, as the public interest required.  
*Citizens' Bank v. The Levee Steam Cotton Press*, 286.
2. The laws which have from time to time been passed for the liquidation of the affairs of the Citizens' Bank of Louisiana, are constitutional. *Ibid.*
3. The decree of forfeiture, pronounced against that bank, did not thereby give the right to the stockholders to insist on an immediate liquidation of its affairs. *Ibid.*
4. The statutes, which provide for a more protracted administration, did not impair the obligation of any contract; nor was the stockholder, in consequence of those statutes, invested with a right to release his property from mortgages which he had created on it. *Ibid.*
5. The stipulation in bonds given to the Union Bank, that in case of non-payment at maturity, the borrower is to pay ten per cent interest after that time, is obligatory, and the party will be condemned to pay it.  
*Bermudez v. Union Bank*, 62.
6. Where a stockholder in the Union Bank, in addition to the usual amount loaned on stock, borrows fifteen per cent on his stock, it will be regarded as a stock loan. *Ibid.*

For Reinscription of the Mortgages of Banks—See *Union Bank v. Deason*, 548.

Exchange Bank, for Forfeiture of Charter—See *Palfrey v. Paulding*, 363.

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Where a bank has discounted a note for the maker, on a pledge of stock, and the maker subsequently took the benefit of the bankrupt law of the United States, the bank had the right to charge interest after the maturity of the note, without proof of protest, as demand, under the circumstances, would have been useless. *Conrad v. City Bank*, 4.
2. Where notice of protest is sent to a post office, in the parish in which the endorser lives, in the absence of proof of a nearer post office, the notice will be deemed sufficient. *Knox v. Buhler*, 42.
3. The fact that the certificate of a notice of protest follows immediately the protest, so as to appear to be a part of the same instrument, does not invalidate the certificate. *Consolidated Bank v. Stewart* 49.
4. An endorsement of a note, executed by an attorney duly authorized, is binding on the principal. *Commercial Bank v. Routh*, 128.
5. Notice of protest addressed to the office where the endorser usually receives his letters, is sufficient. *Ibid.*
6. If the second of exchange be accepted, the holder may recover judgment on it, without accounting for the first of exchange. *Ibid.*

**BILLS OF EXCHANGE AND PROMISSORY NOTES (Continued).**

7. An endorser, who pays a promissory note, when, in consequence of an informal protest, he was discharged, obtains no greater rights against the maker than appertained to the transferror, by whom it was discounted, and from whom it was obtained. The same prescription is applicable to both transferror and transferee. *Brian v. Spencer*, 136.
8. In an action by an endorser, against the maker of a promissory note, who, at the time of its execution, was a married woman, the declarations of the payee, whilst he was the owner thereof, are admissible to prove that it had been given to him for a debt due by the husband of the maker. *Held*: It is the settled jurisprudence of this court, that the *onus* of proving that the consideration of a note, made by a married woman, enured to her benefit, is upon the plaintiff. *Pilcher v. Kerr*, 144.
9. Where the maker of a note signed as a married woman, and her husband only joined for the purpose of authorizing her, it is sufficient to give the transferee of the note notice of her condition; and before he takes the note, it is incumbent upon him to ascertain that her proper estate could be charged with it. *Ibid*.  
A debtor of defendants furnished them with his name, in the form of a draft on their house. The draft was accepted by the defendants, and exchanged with *Partee & Co.*, for bills on their house in New York. *Partee & Co.* placed the acceptance of defendants in the hands of a broker, to raise money on it. It was sold to *P. P. & Co.*, with the right reserved for *Partee & Co.* to take it back on certain terms, within a stipulated time. *Partee & Co.* did not redeem it within the time, and the broker who sold, now bought it of *P. P. & Co.* The broker exchanged the acceptance of defendants thus obtained, with the plaintiffs for other bills of larger amount, and paid the difference. Defendants contest the plaintiffs' ownership of the acceptance, on account of the manner in which it was disposed of by the broker and obtained by the plaintiff.
10. The court held: That the plaintiffs were holders for value; for, according to the well settled doctrine of the commercial law, a merchant who gives his own negotiable paper for a purchase of negotiable paper, gives value, as well as he who gives gold or bank notes. *Greenwood v. Lowe*, 197.
11. The law, from considerations of public policy, and in order to favor the free circulation of bills of exchange and other negotiable paper, looks with favor upon the holder of a bill who has given value for it, and requires very cogent evidence to convict him of *mala fides*. *Ibid*.
12. If, in consequence of the *laches* of the holder, the endorser of negotiable paper be discharged, the holder cannot recover upon a subsequent promise, without showing that it was made with knowledge of the *laches*. Yet, where the promise to pay the debt is given in the form of a new note, it is *prima facie* evidence that there was no negligence by which the endorser was discharged from his obligation on the paper which he thus renews. *Robinson v. Day*, 201.
13. Where an undated bill, endorsed for accommodation of the drawer, and, to enable him to use it in trade, has been deposited as collateral security, the law does not fix its date at the time of its delivery, but the holder may

BILLS OF EXCHANGE AND PROMISSORY NOTES (*Continued*).

fix it at the time when, according to agreement, he is entitled to use his bill.

*Shultz v. Payne*, 222.

14. The accommodation party to a note, holds himself out to the public, by his signature, as absolutely bound to every person who shall take the note for value, to the same extent as if that value were personally advanced to himself, or at his request. Nor is it any defence that the party who takes the note, knows it to be accommodation paper, if, before it becomes due, he takes it *bona fide* and for value. *Matthews v. Rutherford*, 225.
15. An accommodation party to a note, who authorizes the holder to sell, cannot resist payment on the ground that he pledged it. *Ibid*.
16. The following order is not a bill of exchange: "On demand please pay to the order of *W. J.*, the sum of seven thousand dollars, according to a donation made by the Shreveport Town Company to the parish, the same to be in accordance with a resolution of the police jury, passed October 6, 1840." It commences with the direction to pay a sum certain, on demand, but it is qualified by the subsequent reference.  
*Jenkins v. Parish of Caddo*, 559.
17. It is the intention of the parties to an instrument which renders it negotiable, if expressed in terms which may have that effect, and any terms expressing the intent will render the bill or note negotiable. *Preston, J.*  
*Bacon v. Dahlgreen*, 599.
18. Where the conduct of the first endorser of a note, was calculated and intended to induce the notary's clerk to make no further attempt to find the maker, and present the note for payment, and where he undertakes himself to have the money forthcoming, in an action against him, he cannot relieve himself from liability, on the ground that no presentment for payment was made on the maker.  
*Blaffer v. Herman*, 599.

For authority of clerk of steamboat to bind the owners by note, given for supplies—See *Anderson v. Irwin*, 494.

## BONDS.

1. This suit was brought against the sureties upon an appeal bond. *Per Curiam*: The appeal was dismissed because there was no legal order of appeal, which, in legal intendment, is equivalent to no order at all; and without such an order, the clerk had no authority to take bond. The maxim, that in whatever manner a man binds himself, he shall remain bound, is not applicable to a case of this kind. *Sears v. Boyd*, 539.
2. The liability of sureties upon judicial bonds, is fixed by the law which authorizes the taking of the bond. *Ibid*.
3. When the inducement for signing an appeal bond is the supposed existence of an order of appeal, which does not exist, the party signing will be relieved on the ground of error. *Ibid*.
4. A judgment creditor required the sheriff to execute a *fi. fa.* on certain property, and gave an indemnity bond in favor of the sheriff, in which they and their sureties bound themselves to save him harmless, defend all suits that might be brought against him, and pay all damages and judgments that the sheriff might be made liable for in consequence of the seizure and detention of the goods taken in execution. A person who claimed the property, sued the judgment creditors and the sheriff for damages on account of the seizure. The judgment creditors employed



**BONDS (Continued).**

counsel to defend the suit. *Held*: The sheriff had a right to select his own counsel, and under the bond, the judgment creditors and the securities on the bond were liable for the payment of the fee.

*Stewart v. Lapsley*, 641.

For Tax Collector's Bond—See *Copley v. Dinkgrave*, 595.

For Injunction Bond—See *Lowry v. Cobb*, 157.

**BOUNDARY.**

1. When boundaries between two tracts of land are fixed and determined by acts of the same date, passed by the mutual vendors of the claimants, more than a quarter of a century before the existence of any controversy, and acquiesced in by all parties for that long period of time, they must remain undisturbed. *Savage v. Foy*, 573.

2. When an owner has alienated one or two estates which belonged to him, and the property, or any part of it, is contested, the limits assigned to it by the vendor at the time of the sale, must be consulted. The limits anciently subsisting between the two estates must not be regarded, because the designation which the vendor makes of the metes and bounds, forms new limits between the two estates, or between the parts of them which he has sold. C. C. 840. *Ibid*.

**BROKER.**

A broker employed to sell a note, has an implied authority to guarantee it in the name of the vendor: yet, if he do not guarantee it, the vendor is not liable in case of its non-payment. *Fonda v. Garland et al.*, 201.

**CITATION.**

1. The return of the citation of a husband, which shows a service made upon the wife, without stating that the husband was absent from his domicile, is defective. The fact of absence must appear from the return, unaided by other evidence. *Corcoran v. Riddell*, 268.

2. In an action for damages against the owners of a vessel, for the conduct of the master, the owners cannot be brought into court by a service on the latter. *Fellows v. High*, 451.

3. Where one of the joint debtors is insolvent, a claim against him may be placed on his tableau without citing his co-debtor.

*Matter of O'Flaherty*, 640.

See Garnishee—*Landry v. Dickson*, 238.

**CODE, CIVIL.**

1. The article of the Civil Code, 2235, in declaring under what circumstances the authentic act shall not be full proof between the parties, uses the word "forgery" in the sense of "falsity." *Succession of Tele*, 95.

2. The interest of the mother in the estate of her deceased child must be governed by articles 899, 900 of the Civil Code which treat of inheritance, and not by article 1481, which treats of donations. That interest, therefore, is one-fourth and not one-third of the child's estate.

*Grover v. Clarke*, 174.

CODE, CIVIL (*Continued*).

3. The power granted by the 1st section of 438th article of the Civil Code, is a power to be exercised under conditions. *Slidell, J.*  
*Palfrey v. Paulding*, 363.
4. Article 656 of the Civil Code should be so construed, as to reconcile the respect due to property with the interests of agriculture.  
*Becknell v. Weindhal*, 291.
5. The prohibition contained in art. 1477, C. C., has not exclusive reference to citizens of other countries; it applies to sovereign States or corporations: for corporations, legally ordained, are substituted for persons. Therefore, where a testator bequeathed immovable property situated in Louisiana to trustees, to be held by them for the benefit of a charity in Tennessee, where the validity of the bequest is disputed, the trustees should show that the laws of Tennessee do not prohibit similar dispositions from being made in favor of a citizen of Louisiana. *Rost, J.*  
*Succession of Franklin*, 395.
6. Plaintiff was one of two sureties upon a note made in Georgia, and placed in the hands of a trustee. He afterwards paid the note and brought this suit against his co-surety and the maker of the note. *Held*: That, the plaintiff having paid, without being sued, and without informing the principal debtor, no equity exists in his favor; and the case must be determined as if the trustee himself was seeking to enforce the trust against the defendants. C. C. 3025. *Gates v. Renfroe*, 569.
7. The privilege for freight, conferred by article 3213 of the Civil Code, extends only to goods of which the captain has, or has had, possession.  
*Granger v. Campbell*, 611.
8. The transferee is only possessed, as regards third persons, after notice has been given to the debtor of the transfer having taken place. C. C. art. 2613. And an execution may be properly levied by creditors, previous to such notice.  
*Burton v. Brewer*, 620.

## GENERAL REFERENCES TO THE ARTICLES OF THE CIVIL CODE.

840, (*Boundary*,) page 573.—1176, 1380, 3507, (*Prescription*,) p. 553.—1477, (*Wills*,) p. 395.—1507, (*Substitutions*,) p. 395.—1677, (*Seizin of Executor*,) p. 472.—1716, (*Construction of Wills*,) p. 127.—1964, (*Fraud*,) p. 456.—2042, (*Sale*,) p. 477.—2157, (*Subrogation*,) p. 34.—2299, 2302, 2739, (*Damages*,) p. 321.—2370, (*Community*,) p. 395.—2449, (*Construction*,) p. 465.—2927, (*Deposit*,) p. 53.—2966, (*Mandate*,) p. 207.—3025, (*Surety*,) p. 569.—3120, (*Pledge*,) p. 221.

## CODE OF PRACTICE.

1. A petitory action for land, can only be maintained against the possessor or owner. C. P., art. 43.  
*Peck v. Overton*, 70.
2. Under article 626 of the Code of Practice, orders of execution must be sealed with the seal of the court.  
*King v. Baker*, 570.
3. Article 684 of the Code of Practice, which prohibits a sale of property under execution, if the price offered does not exceed the amount of the privileges and mortgages with which it is encumbered; and the article that authorizes the sheriff to raise the mortgage, the inscription of which is subsequent in date to that of the mortgage under which the sale is made, have exclusive reference to conventional mortgages.  
*Kelly v. Cook*, 614.

CODE OF PRACTICE (*Continued*).

GENERAL REFERENCES TO THE CODE OF PRACTICE.

179, 252, (*Garnishees*,) p. 238.—275, (*Sequestration*,) p. 578.—378, 379, (*Calling in Warranty*,) p. 590.—1007, (*Executor*,) p. 69.

COMMON LAW.

At the common law, a person who receives property under a fraudulent conveyance, to screen it from the debts of the owner, cannot sustain the conveyance in action against a subsequent vendee who derives title from a sale by the same owner. *Ray v. Harris*, 138.

COMMUNITY.

1. Property purchased during the marriage by either husband or wife, is presumed to be liable for community debts, unless the contrary be shown. C. C. 2371. *Webb v. Peet*, 92.
2. Where a creditor of the husband seizes property as liable for community debts, which the wife claims as having been acquired by her after a judgment of separation of property between herself and husband, it is incumbent upon her to show, affirmatively, the reality and good faith of the judgment of separation, if the creditor attacks it upon the ground of fraud. *Ibid.*
3. The fruits of paraphernal property belong to the community, so long as the husband retains the administration of it. *Ibid.*
4. Where community property has been mortgaged by a surviving partner in community, for the purpose of raising funds for the maintenance and education of the heirs, pursuant to the advice of a family meeting, which advice was concurred in by the judge of probates, and the property is afterwards sold to satisfy the mortgage, the heirs cannot reclaim it without at least offering to refund the amount for which it was mortgaged, with interest. *Ibid.*
5. A marriage contracted out of the State, between persons who afterwards come here to live, (*s'y établit*,) is also subjected to the community of acquets, with respect to such property as is acquired after their arrival. C. C. art. 2370. For the true sense of the language of the code, the inquiry should be, did *Franklin* and his wife live in Louisiana? Were they established here? By the words of the code, we are to understand the domestic domicile, the true and permanent home; that domestic hearth, where the husband and wife have surrounded themselves, and their offspring, with the comforts of domestic life; and from which, when he and his wife occasionally depart, for the purpose of business, or pleasure, they do so with the intention to return. *Slidell, J.*  
*Succession of Franklin*, 395
6. When persons, married elsewhere, acquire property after they come to reside here, it belongs to the community of acquets; but not that which the husband purchases before he becomes a resident of Louisiana. *Wolfe v. Gilmer*, 583.
7. When a man married two wives, and the second wife was in good faith, each wife is entitled at the death of the husband to a community interest. *Hubbell v. Inkstein*, 252.

See Sale—*Shields v. Lafon*, 135.

## COMPENSATION.

See Injunction—*Hooper v. Rhodes*, 137.

See Pleading—*Maillet v. Martin*, 635.

## COMPROMISE.

1. Where the parties had agreed upon a compromise, a stipulation of which was, that the defendant should pay the plaintiff ten thousand dollars in cash, and the defendant having complied with the other stipulations, expressed his inability to pay that sum in cash, but offered five thousand dollars in lieu thereof, which amount was placed in the hands of an attorney to be paid if the offer was accepted, the plaintiff having taken the same under the circumstances without any objection, will be considered as having accepted the offer. *Packwood v. White*, 31.
2. When, as a part of a compromise, a judgment is confessed, the conditions of the compromise may be shown by any legal evidence; and such evidence will not be considered as controlling or limiting the effect of the judgment. *Ibid.*
3. There is nothing illegal in an agreement in the sale of a suit by which it is stipulated, that the suit shall be prosecuted in the name of the plaintiff, for the benefit of the assignees. Satisfaction of the judgment entered by the parties to the record, or by the sheriff, would protect the defendant. *Towne v. Couch*, 93.

## CONFLICT OF LAWS.

1. It is the settled jurisprudence of the United States, that the plea of a statute of limitation to an action on a judgment rendered in another State, is a plea to the remedy, and, therefore, the *lex fori* must govern. There is nothing in the Constitution of the United States, or laws under it to justify an exception to the rule. *Taylor v. Joor*, 272.
2. Plaintiff sold his cotton, in Arkansas, to a purchaser, who paid the largest proportion of the price in counterfeit bank notes; the purchaser brought the cotton to New Orleans, and defendants advanced on it. Plaintiff sued defendants for the value of the cotton. It was held, that he could not recover, notwithstanding the statute of Arkansas provides that the owner may recover the property out of which he has been swindled, from any subsequent holder. And, by the court: We cannot enforce a rule, resting for its exercise in comity, to the detriment of the rights of our own citizens, secured under our own laws, and the interests of commerce. The plaintiff, in this case, by putting his cotton in possession of the purchaser, as owner, reposed confidence in him, gave him credit, and enabled him to commit a fraud on the defendants; and the equity of the original owner is not equal to that of defendants, who have parted with their money, on the faith of a state of things which the plaintiff, himself, was the cause of being created. *Tatum v. Wright*, 358.
3. Where the note sued on was made in the State of Mississippi, and payable there, the obligations created by it must be tested by the laws of that State; and whatever acts of the parties which operate an extinguishment of the contract there, will undoubtedly prevent a recovery elsewhere. *Bacon v. Dahlgreen*, 599.

CONSTITUTIONAL LAW.

1. Where, in conformity to an act of the Legislature, the trustees of a sixteenth section granted by Congress for public schools, leased the same for fifty years, the contract is valid. There is nothing unconstitutional, or contrary to the laws of the United States, in such a contract.  
*Garland v. Jackson*, 68.
2. The act of April 3d, 1832, for opening streets, &c., in the city of New Orleans, is contrary to the article 109 of the Constitution of the State, so far as it authorizes private property to be taken for public uses, without an adequate compensation *previously* made.  
*Municipality No. Two, for Opening Euphrosine Street*, 72.
3. The act of 3d of April, 1832, for the opening of streets, etc., in New Orleans, is not unconstitutional in cases where, in proceeding under it, provision is made for payment for the property before the expropriation is effected.  
*Municipality No. Two, for the Opening of Roffignac street*, 76.
4. Article 30 of the Constitution, providing that no person who may have been a collector of taxes, &c., shall be eligible to any office of profit or trust, until he shall have obtained a discharge for the amount of such collections, is directory, and was intended to secure what was right, and not to effect what was wrong.  
*The State v. Hayes*, 118.
5. The act of the Legislature of the 3d of March, 1847, investing the tax collector with the authority to seize and sell the property of a defaulting tax debtor, to satisfy his tax, is not in violation of that article of the Constitution of the United States, which provides, that no person shall be deprived of life, liberty or property, without due process of law; for the act itself points out, precisely, that very process of law by which the defaulting tax debtor may be deprived of his property.  
*Union Towboat Company v. Bordelon, &c.*, 192.
6. Nor does that act, from the fact that the tax collector is empowered to seize and sell the property of a defaulting tax debtor to pay his tax, without the aid or intervention of the judiciary, violate the Constitution of the State. For, by the Court: it is true, as contended, that the functions of our departments of government are kept distinct, and the executive cannot divest judicial process. But the assessment of taxable property and the collection of taxes, are legal proceedings or process, but not judicial proceedings or process. If these proceedings take place illegally, as supposed in the present case, then the functions of the judiciary may be invoked, but not otherwise.  
*Ibid.*
7. The tax levied on a steam towboat belonging to a company, the object of which is "towing vessels by steam in and out to sea and up and down the river Mississippi, and carrying freight and passengers in like manner; also wrecking or lightening vessels in said river or sea, and carrying freight and passengers in the Gulf of Mexico, and elsewhere at sea." is not in contravention of Article 1st, section 8, of the Constitution of the United States, which gives Congress power to regulate commerce with foreign nations, and among the several States.  
*Ibid.*
8. The 27th article of the Constitution, does not exempt the Lieutenant Governor from the service of civil process.  
*Landry v. Dickson*, 238.

CONSTITUTIONAL LAW (*Continued*).

9. It was competent for the State to make such changes in the mode of administration of the insolvent banks, as the public interest required.  
*The Citizens' Bank v. Levee Steam Cotton Press*, 296.
10. The laws which have from time to time been passed for the liquidation of the affairs of the Citizens' Bank of Louisiana, are constitutional. *Ibid.*
11. The decree of forfeiture, pronounced against the bank, did not thereby give the right to the stockholders to insist on an immediate liquidation of its affairs. *Ibid.*
12. The statutes, which provide for a more protracted administration, did not impair the obligation of any contract; nor was the stockholder, in consequence of those statutes, invested with a right to release his property from mortgage which he had created on it. *Ibid.*
13. The law authorizing the auditor of the State to issue a warrant of distress, is not in violation of the Constitution. *Duncan v. The State*, 377.
14. The prohibition to a citizen of Louisiana, to make donations *causa mortis* in favor of citizens of other States, does not conflict with the 2d sec. of the 4th article of the Federal Constitution, guaranteeing to the citizens of each State all the privileges of the citizens of the several States. *Rost, J. Succession of Franklin*, 395.
15. If article 1477 of our code, was intended, by way of retaliation, to prohibit our citizens from making donations *mortis causa*, to citizens of Tennessee, both laws would be void, as conflicting with the 2d section of the 4th article of the Constitution of the United States, guaranteeing to the citizens of each State, the privileges of citizens of the several States. *Preston, J. dissenting. Ibid.*

See Conflict of Laws—*Taylor v. Joor*, 272.

## CONSTRUCTION.

1. Where, under the facts shown, the court may reasonably suppose a state of opinion, or belief, in a party's mind, which is entirely consistent with honesty and fair dealing, and where there is another hypothesis involving dishonesty, it will be the duty of the court, unless the scale clearly preponderates in favor of the latter, to adopt that construction which is in favor of innocence. *Greenwood v. Lowe*, 197.
2. A safe rule of construction of a guaranty is, to give the instrument that effect which shall best accord with the intentions of the parties, as manifested by the terms of the guaranty, taken in connection with the subject matter to which it relates;—neither enlarging the words beyond their natural import in favor of the creditor, nor restricting them in aid of the surety. *Menard v. Soudder*, 385.
3. It will be presumed, unless the contrary appear, that all the parties to an agreement had knowledge of their legal rights; where, therefore, there are ambiguities and conflicting stipulations in the agreement, and one party claims the waiver of a legal right by the others, in his favor, the ambiguity will be construed against the party claiming the benefit; for it was incumbent on him to have given such explanations, at the time of entering into the agreement, as would have prevented the doubt. *Shepherd v. Phillips*, 453.

CONSTRUCTION (*Continued*).

4. Ambiguous or obscure clauses in the contract of sale, are interpreted against the seller, who is bound to explain himself clearly as to the extent of his obligations. Code, 2449. *Gray v. Lowe & Co.*, 465.
5. The stipulation in a contract, that the captain of a bell boat should have "free and full possession of the wreck," meant nothing more than a possession or holding for the purpose of saving the cargo and property, and the exclusion of all interference with his wreck; but not a possession adversely to the owners. *Shute v. Dodge*, 479.
6. The notary concluded the will thus: "This will has been dictated to me by sieur *Macarty*, and I, the said notary, have written the whole in my hand, such as it has been dictated to me by the said testator, in the presence of the witnesses hereafter named and undersigned," &c. The question being, whether the words used import that the will was dictated in the presence of the witnesses, or was only written in their presence. *Held*: The words, "in the presence of the witnesses hereafter named and undersigned," in this connection, would apply indiscriminately to the whole clause—to the dictation as well as to the writing. *Nelder v. Macarty*, 484.
7. A decree of the chancery court in Alabama, and a deed of compromise executed there, that would have the effect in that State of estopping a party from setting up title to certain property, will receive a like construction in the courts of Louisiana. *Baldree v. Davenport*, 589.

For Construction of the Act of 18th March, 1850, relating to the Parish of Claiborne—See *Wafer v. Wafer*, 541.

CONTINUANCE.

1. The court will not grant a continuance on the ground that a commission has not been returned, where the application for the commission was not made in time. *Gardner v. O'Connell*, 453.
2. Where an inferior court, in a capital case, refused a continuance, though the defendant offered affidavits, setting forth the fact of the materiality of absent witnesses, and of due diligence in procuring them. *Held*: There was no error, the court below believing the application to be simply an artifice to obtain delay. *State v. White*, 531.
3. The rule, that on an application for a continuance, due diligence should be shown, is well settled. *Vaiden v. Abney*, 575.
4. It is equally clear, that a party's assertion, that he has used due diligence, will not be heeded, when his *laches* are patent upon the record. *Ibid*.

CONTRACT.

1. When a party has been induced, by misinformation and a suppression of material facts, to take a joint interest in a shipment of merchandise to a foreign port, he is entitled to have the contract annulled, and to recover from the other party any sums he may have paid on account of the shipment. *Lopez & Co. v. McAdam & Co.*, 58.
2. The fact that one party to a contract, through complaisance, and at the request of the other party, rendered a service, cannot raise a presumption against the former, that she thought herself bound by the contract to render it. *Baron v. Placide*, 229.

CONTRACT (*Continued*).

3. Where the contract provides a penalty for its breach, and points out the manner in which it is to be dissolved, a dissolution of it in a manner not pointed out, is a breach, and the penalty is thereby incurred. *Ibid.*
4. Where a contract has been partly executed, and justice requires it, the court will modify the penalty. *Ibid.*
5. Where, under two contracts, the purchaser bought two parcels of drafts, his right to one of the drafts being afterwards questioned, it was held, that his failure to establish by which of the contracts he obtained the draft, did not invalidate his title, where it was clear that he had obtained it under one or the other of the contracts. *Gray v. Lowe & Co.*, 465.
6. Defendant owned the Mexican Gulf Railroad, and also a steamboat which ran from Pearl River to Proctorville, the gulf terminus of the road. At the former point, cotton was shipped to plaintiffs under a bill of lading given by the captain of the boat, binding him to deliver the cotton at the port of New Orleans, unavoidable dangers of the navigation and fire, only excepted. The cotton was transferred from the vessel to the cars and destroyed by fire, issuing from the chimney of the locomotive, *in transit* to New Orleans. The court held, that the contract to carry the cotton was entire, and the exception in the bill of lading against loss by fire, extended as well to loss on the cars as on the boat, and that defendant was not bound for the loss. *Oakey v. Gordon*, 235.
7. It will be presumed, unless the contrary appear, that all the parties to an agreement had knowledge of their legal rights; where, therefore, there are ambiguities and conflicting stipulations in the agreement, and one party claims the waiver of a legal right by the others, in his favor, the ambiguity will be construed against the party claiming the benefit; for it was incumbent on him to have given such explanations, at the time of entering into the agreement, as would have prevented the doubt. *Shepherd v. Phillips & Co.*, 458.
8. The captain of the steamer Concordia, who was part owner, had an insurance in an office, of which *Snetthen* was the agent. The boat was sunk; the captain abandoned, and *Snetthen* refused to accept the abandonment. The captain then made a contract with *Snetthen*, as the agent of a bell boat, to "save the cargo and other property from the wreck, in consideration of the salvage hereafter to be agreed upon, by certain named arbitrators, and the free and full possession of the wreck." The bell boat raised the steamer and brought it to New Orleans, where it was sold by the port wardens. The owner of the bell boat bought it, and had it repaired. *Held*: The sale, by the port wardens, was illegal, and the purchaser acquired no rights by the purchase. *Shute v. Dodge*, 473.
9. The purchaser had no right to have the steamer repaired at the expense of the owners, and they are only responsible for those repairs, to the extent that they are benefitted. *Ibid.*
10. The circumstance, that the owner of the bell boat raised the steamer, by means of his boat, gave him no right to possession of the steamer. *Ibid.*
11. The repeal of a penal statute prevents a penalty or fine from being enforced, but does not render a contract made in defiance of law valid, nor does it give any right of recovery on such a contract. *Quarles v. Evans*, 543.



CORONER.

See *Sheriff—Purvis v. Broad*, 636.

CORPORATIONS.

1. Although a corporation had expired by limitation, and judgment of forfeiture of charter had also been pronounced against it on behalf of the State; yet, where, from the nature and objects of the institution, a power to liquidate its affairs, after the expiration of its charter, might have been foreseen as absolutely necessary, the power to accept from the State an extension of the charter, for the purposes of liquidation, will be implied; and this extension enabled it to sue a defaulting stockholder, notwithstanding the enabling statute was passed subsequent both to the decree of forfeiture, and the expiration of the charter by limitation.

*Consolidated Association v. Claiborne*, 318.

2. Although a bank charter contains no provision for its forfeiture in the event of a failure to pay specie; yet, where there was in force, at the date of the charter, a general law to the same effect, the forfeiture can, under that law, be enforced.

*Palfrey v. Paulding*, 363.

3. The Exchange and Banking Company was one of the banks that had incurred the forfeiture of their charter, by the suspension of specie payments, and the act of 1839 was intended to apply to it.

*Ibid.*

4. The acts of the corporate officers of a corporation, are admissible evidence from which the fact of acceptance of a particular charter may be inferred. It is not indispensable to show a written instrument, or vote of acceptance, on the corporation books. It may be inferred from other facts, which demonstrate that it must not have been accepted.

*Rost, J.*

*Ibid.*

5. The stockholders of the Exchange and Banking Company are not personally bound for debts contracted by the bank, after the promulgation of the act of 1839.

*Eustis, C. J.*

*Ibid.*

6. I am not satisfied that the act of 1839 was accepted by the bank in such a manner, as to bind creditors of the corporation.

*Slidell, J.*

*Ibid.*

7. It was decided in this case, that the Orleans Navigation Company had forfeited its charter, by violating the conditions of the act of incorporation; but held, "The charter requires the company to keep, ordinarily, three feet of water [in the canal] at low tides; yet the fact of less water being found occasionally, in consequence of extreme low stages of the lake, should not be attended with a forfeiture of the charter."

*The State v. Orleans Navigation Company*, 679.

COURTS.

1. The judge has the right, and it is his duty to explain to the jury what constitutes the crime charged against the accused; and, on the indictment for carrying on a banking game, he may explain to the jury what constitutes a banking game.

*State v. Glass*, 122.

2. There is nothing so irregular in the court granting leave to an attorney to withdraw a commission, for the purpose of having it properly authenticated, as to justify the rejection of the testimony.

*Calmes v. Stone*, 133.

3. The change in the name of the court merely, does not change its powers, or the modes of proceeding as prescribed by law. Therefore, where the

COURTS (*Continued*).

jurisdiction of the criminal court over the limits of the present Third District was transferred to the Third District Court of the State, with it were necessarily transferred the modes of prosecution prescribed by law for the criminal court. *State v. Eochart*, 224.

4. Where the suit was brought against C, in the Second District Court, and his succession was afterwards opened in the Fourth, it was held that the Second District Court had jurisdiction to try the suit which had been brought. *Culler v. Cresswell*, 367.

See SUPREME COURT.

See PRACTICE.

## CRIMINAL LAW.

1. A person cannot be twice tried for the same act; and where there were two indictments against the prisoner for the same act, one charging him with having committed a grievous assault, and the other for putting out an eye of another person, a trial and conviction for the first offence is a bar to a trial to the second. *The State v. Cheevers*, 40.
2. An indictment, couched in the very terms of the statute, charging that the accused did inveigle, steal and carry away a slave, so that the owner was deprived of her services, necessarily implies that the acts were criminal; and it is not essential that it should charge that the acts were done feloniously, maliciously or unlawfully. *The State v. Benjamin*, 47.
3. Where it does not appear from the record that the accused, before trial, was served with a list of the jury, it will be presumed he was served, or waived his right, unless there be evidence that he objected to going to trial upon that ground. *The State v. Benjamin*, 47.
4. The offence of making a false act by a notary, is punishable by the act of 7th of June, 1806. *Succession of Tete*, 95.
5. On the 1st of October, 1849, the accused was indicted for a murder alleged to have been committed on the 10th of August, 1848. The jury found him guilty of manslaughter only. *Held*: That the accused, not having been indicted within twelve months after the offence was committed, he could not be legally convicted of manslaughter. *The State v. Cobb*, 107.
6. Where a motion in arrest of judgment has been sustained, the State may appeal. *Ibid.*
7. A prisoner cannot be allowed to take the chance of a verdict in his favor, and when rendered against him, successfully attack it for facts known to him before the trial. *Ibid.*
8. The incompetency of a juror, unless he has been challenged, is not a good ground for a new trial. *Ibid.*
9. The fact that an incompetent juryman sat upon the trial without being challenged, is not good ground for a motion in arrest of judgment. *Ibid.*
10. A judge or court, authorized to issue a writ of *habeas corpus*, cannot refuse bail, by sufficient securities, except for capital offences, where the proof is evident or the presumption great. It is the constitutional right of the prisoner to demand it, and it is not in the discretion of the

CRIMINAL LAW (*Continued*).

- judge to deny it, nor does the conviction of the prisoner deprive him of the right. *Longworth, Praying for a Writ of Habeas Corpus, 247.*
11. Where an offence, other than willful murder, arson, robbery, forgery and counterfeiting, has not been committed within the year next preceding the indictment, the indictment should show, that the accused cannot avail himself of the limitation, by charging that he absconded or fled from justice, or that the crime was not discovered and denounced in the manner pointed out by the act of 25th March, 1844, until within a year of the finding by the grand jury. *State v. Foster, 255.*
12. The indictment charged that the mortal stroke was given in the parish of St. Bernard, but that the deceased languished and died on Lake Borgne, It was held, that it was proper to charge in the indictment, the truth that the death occurred on Lake Borgne, and it was immaterial whether it occurred within the jurisdiction of Louisiana, Mississippi, or on the high seas, within the jurisdiction of the United States. *Ibid.*
13. To maintain the plea of *autre fois convict*, the crime must not only be the same for which the defendant was before convicted, but the conviction must have been lawful on a sufficient indictment. *Ibid.*
14. The accused was indicted for murder, and convicted of manslaughter. The indictment was insufficient to sustain the charge of manslaughter and judgment was arrested, but without prejudice to a legal prosecution for the crime of manslaughter. *Ibid.*
15. The clerk of a court, to which a criminal cause is removed for trial, should endorse on the indictment and other papers received by him from the court where the indictment was found, that he filed them. Yet where he failed to do so, and the prisoner was put upon trial, but before verdict, a motion was made to endorse the papers *nunc pro tunc*, it was held: That the court had the custody of the papers, and it was its duty to grant the motion. *State v. Alvarez, 283.*
16. Objection to the pannel or polls cannot be taken advantage of, if not made by challenge, when the jury or jurors are presented to the prisoner on trial. He cannot take the chance of a verdict in his favor, by a jury of his choice, and afterwards object to that jury. *Ibid.*
17. In an indictment for an assault with *intent to commit* an offence, the same particularity of averments is not necessary, that is required in indictments for the *commission* of an offence. *State v. Green, 518.*
18. In the prosecution of two or more, under an indictment, charging an intent to commit murder, it is immaterial which makes the assault, or gives the blow, if it is inflicted with the intent charged: all concurring in that intent, the crime is committed by all. *Ibid.*
19. It is not a sufficient ground for a new trial that the judge, when the jury returned into court without having agreed on their verdict, instructed them a second time on the evidence, as to matters about which they had made no inquiry, and on the law, as to points on which they had stated neither doubt nor difficulty. *Ibid.*
20. In summing up the testimony in a criminal case, it is legitimate for the judge to present his views of conflicting evidence, and to advert to such

CRIMINAL LAW (*Continued*).

collateral circumstances, which are proved, as may have a favorable or unfavorable bearing on the issue. *Ibid.*

21. The Supreme Court disapproved of the district court expressing to the jury the determination to keep it empannelled, until a verdict was found. *Ibid.*

22. In cases of felony, where several are present, aiding and abetting, they may be joined with the principal in the first degree, and charged in the indictment, either as actual perpetrators, or as aiders and abettors.

*State v. White*, 531.

23. When the principal in the second degree is charged as an aider or abettor, it is not necessary to set forth in the indictment the means or manner by which he became thus guilty, but merely to describe him generally as being present, aiding and abetting at the felony and murder, (as the case may be), committed in manner and form as aforesaid. *Ibid.*

24. If a person be *present*, aiding and abetting, he cannot be indicted as an accessory. *Ibid.*

25. Three requisites must combine to make an aider and abettor a principal: he must be *present, aiding and assisting*, with a felonious intention to the felony. *Ibid.*

26. Section 35 of Act of May 4, 1805, does not require that a copy of the indictment, and a list of the jury which are to pass on the trial of the accused, should be delivered to him before arraignment. It requires that they should be delivered to him two entire days before trial.

*State v. Holmes*, 567.

27. The proper time for the prisoner to make the objection, that he has not been served with a copy of the indictment, is when he is called up for trial, and his not doing so at that time will amount to a waiver of the copy of the indictment. *Ibid.*

28. The evil to be suppressed by the act of 19th March, 1835, entitled an act to prevent gambling, was the gaming house with its capital, always ready for play. Whether the capital, or stake, is owned or furnished by the house or made up at the time by the players, the offence is the same. *Held*: Therefore, that the game of Keno is within the statute of 1835.

*City of New Orleans v. Miller*, 651.

29. The municipal authority of the city, has no power to impose a penalty on that which the law of the State has made punishable as an offence.

*Ibid.*

For Proceedings on Bail Bonds under the act of 11th March, 1837—See Bail and Bail Bonds—*State v. Lewis*, 540.

See Evidence—*State v. Parker*, 63.

## CURATOR.

See Mortgage—*Aicard v. Daly*, 619.

## DAMAGES.

1. The plaintiff had sold to *Fields*, a quantity of coal, which was to be paid for on delivery. *Fields* failed to comply with his bargain, as to the payment. The defendant being a judgment creditor of his, caused the coal to be seized by the sheriff. The plaintiff demanded the rescission of the

DAMAGES (*Continued*).

- sale to *Fields*, upon the non-payment of the price, which was assented to by all parties, and the coal restored to him. He then brought suit for the damages caused by the seizure. *Held*: That under the circumstances, he was not entitled to damages, more especially as he had suffered *Fields* to retail some of the coal, which may have misled the defendant. *Batson v. Ricks*, 24.
2. Where the plaintiff claims damages for the cutting and carrying away his timber, the proper measure of his damages will be the value of the timber, and not the amount which the timber may be worth when sawed up into plank, or used in any other way. *Yarborough v. Nettles*, 116.
3. Defendants chartered a ship from plaintiff, and bound themselves to furnish a full cargo; instead of so doing, they notified plaintiff that they considered themselves absolved, and that they would not furnish the cargo. The measure of damage is not necessarily the amount of freight upon a full cargo, but the damage actually suffered, in view of the state of things which existed at the time of the notification. *Wilson v. Cammack*, 155.
4. Suits for damages should not be matters of speculation, but reasonable claims for indemnification. *Keay v. Canal and Banking Co.*, 259.
5. In estimating the damages resulting from a collision, a claim for "loss of the use of a vessel, and of the profits which she could and would reasonably have made during her detention," will not be allowed, at least in a case where the collision was not wanton and malicious. The damage is too remote and uncertain. *Quarrier v. Richards*, 277.
6. Rule of damages where defendant is in good faith. C. C. 1928, s. 1.  
*Rugely v. Goodloe*, 294.
7. The Wardens of the Church of St. Louis employed *Kirwan* to rebuild the cathedral, under the direction and superintendence of their architect, according to plans agreed upon. *Kirwan* employed the plaintiff as his master bricklayer. Owing to some defect in the plan, work or materials, and without any fault of plaintiff, a tower fell and inflicted on him a severe injury. He sued both *Kirwan* and the Church Wardens for damages, and a jury rendered a verdict against defendants, *in solido*, for \$2500. On appeal, the verdict was sustained.  
*Camp v. The Church Wardens*, 321.
8. The general rule of law is, that a principal is liable to a third person for the torts, neglects and omissions of duty of his agent, in the course of his employment. *Ibid.*
9. Those provisions of law which render the owner of a building liable for the damage occasioned by its ruin, resulting from a vice in its original construction, or from neglect to repair it, are entirely independent of the general rules concerning the responsibilities of masters and employers; they are evidently founded in an enlightened view of public necessity; they protect the neighbor and the passenger in the street, and it would be singular, indeed, if the men at work on the building were excluded from their just and salutary operation. Per *Eustis*, C. J. *Ibid.*
10. In an ordinary case, where a landholder makes a contract with an undertaker to erect buildings on his land, and in the performance of the work, by the undertaker, an accident occurs to an individual, whether a passer-by or a person laboring at work; the landholder who has not resumed

DAMAGES (*Continued*).

- possession, and who has used reasonable diligence to select a discreet and competent undertaker, is not answerable to the person injured. Whatever responsibility there may be for such accident, is thrown upon the undertaker, by the article 2739 of the Civil Code. *Ibid.*
11. But, where the landowner retains a continuous and active direction and control over the work, he is answerable for an injury sustained by a workman, in consequence of its defectiveness. *Per Slidell, J. Ibid.*
  12. The responsibility which articles 2299 and 2302 create against the master and house-owner, is of the same nature and degree. As a general rule, under these articles, the master and house-owner are alike responsible for slight neglect. *Ibid.*
  13. The plaintiff having been employed as master mason, by the contractor, *Kirwan*, stands towards the house-owners and contractor as if he had been employed by themselves. They were bound only to use ordinary diligence in the selection of their architect and their builder; and as the men selected had been long engaged in those pursuits, and had the reputation of being persons every way competent to the task, due diligence was used; an action, therefore, cannot be maintained against them. *Ibid.*
  14. A master is not responsible to his servant, for an injury sustained by such servant, in consequence of the negligence of a fellow servant, provided the servant injured was, at the time, acting in his master's service, and the servant causing the injury was a person of ordinary skill and care. *Per Rost, J., Preston, J., concurring. Ibid.*
  15. Interveners, who sustain their pretensions, will not be entitled to recover counsel fees, where the attaching creditor, who resisted their claim, was in good faith prosecuting what he deemed a legal right. *Hopkins v. Pratt, 336.*
  16. A slave, whose appearance and color gave no indication of African extraction, passed himself as a white person, and took passage on a steamer. After several days, the captain suspected his true condition, and delivered him to the civil authorities at Memphis, as a runaway. In an action, by the master, for damages, it was held that the captain was not liable. *Williamson v. Norton, 393.*
  17. A proprietor who neglects to keep up the levees in front of his land, is bound to make indemnity for any damages resulting from the negligence. *Grant v. McDonogh, 447.*
  18. Where an article is unsound at the date of the sale, the standard of responsibility of a *bond fide* seller, is the difference of value at the date of the sale between the sound and the unsound article. *Foster v. Baer, 613.*
  19. At the time of the shipment of a planter's crop of cotton, the overseer was told by the master of the steamer on which it was shipped, that the stage of the water did not justify his taking the whole crop. In consequence of the stage of navigation, some of the bales were afterwards put on shore, the steamer retaining as many as she could carry out of the river. The evidence did not show that those which were left, could, by any other conveyance, have been taken to market sooner. *Held: That the steamer was not liable for damages.*

*Pearl River Navigation Company v. Douglas, 631.*

**DAMAGES (Continued).**

20. The facts show that the defendants are not spoilers. *Held*: That no vindictive or consequential damages can be recovered against them.

*Carrell v. Municipality No. 2*, 632.

21. This action was brought to recover damages from the vendor of cotton, on the ground that when the bales were opened, it was discovered that the cotton was "country damaged." *Held*: It is indispensable for the plaintiff's action, that they should prove the existence of the damage at the date of the sale, and should show the extent of that damage with such reasonable certainty as to enable the court to assess the just reduction of price. The burden is on the plaintiffs to make the facts reasonably clear and certain.

*Lowe v. Nelson*, 646.

Measure of damages where seller is in good faith; restitution of the price and cost of the action under which he was evicted—See *Cocoran v. Riddell*, 368.

See Letting and Hiring—*Depuilly v. Wardens of the Church of St. Louis*, 443.

See Jury—*Grant v. McDonogh*, 447.

See Landlord and Tenant—*Powers v. Florance*, 524.

See Bonds—*Stewart v. Lapsley*, 641.

**DEDICATION.**

1. Towns and cities may be projected, and streets, public squares and roads, may be laid out on plans; but so long as the ground remains enclosed and no portion of it is sold with reference to those plans, and no express dedication is made and accepted by the proper authority, the right of the owner to the soil which those streets, public squares and roads cover, is not affected thereby, *The Town of Carrollton v. Jones*, 233.
2. No particular form of words is necessary to effect a dedication to public use; but to render it binding, it is necessary not only that there be some act of dedication on the part of the owner, but there must also be something equivalent to an acceptance on the part of the public. In analogy to other contracts, the concurrence of two parties is necessary to pass the right. *Ibid.*
3. When neither the dedication nor the acceptance are express, the rights claimed in behalf of the public, must be supported by long continued usage. *Ibid.*
4. The acceptance of a dedication to the public, implied from user, is a deviation from the civil law proper, forced, as it were, upon courts, by the necessities of the country, and resting purely upon precedent. But when the dedication rests upon the naked acceptance for the public, whoever accepts must be clothed with the authority of the sovereign, or the acceptance is not binding.

*Municipality No. 3 v. Levee Cotton Press*, 270.

5. The right to establish public places and to change their destination, is an attribute of sovereignty which the Legislature may delegate to corporations. The Legislature of Louisiana has delegated this power to the city of New Orleans, without reservation; under the grant, it is compe-

DEDICATION (*Continued*).

test for the city government to accept a dedication of public streets, and equally competent for it to annul the acceptance before the streets have been opened, provided no vested right, acquired under the dedication, is affected by the change. *Ibid.*

6. There is no evidence of the dedication of the lot bounded by Camp, Casseum and Robin streets, in the suburb Lacourse, to public use.

*Municipality No. Two v. Palfrey*, 497.

7. The failure to pay taxes on property, even for a great length of time, does not prove an abandonment of the property to public use. *Ibid.*

8. In an original plan of division of suburban property, there was the same indicia of the dedication of a lot to public use that there was of the streets. The streets and the lot were not separated by lines. The lot was not subdivided for sale, nor colored like the squares around, which were for sale. There was a cessation of all use of the lots as private property for forty years, and an abandonment of it to the public for that time, nor were any dues for taxes paid upon it. *Held*: that this amounted to a dedication of the lot as a public place. *Preston, J.*, dissenting.

*Ibid.*

9. In 1807 *Delogny* and *Livaudais* laid off two tracts of land, within the corporate limits of New Orleans, according to plans on which figured a square designated as "Place de l'Annonciation." In the middle of the square there is an "Islet," on which is drawn the ground plan of a building, of vast dimensions, marked "Eglise de l'Annonciation." The square "de l'Annonciation" and the "Islet" were, for nearly half a century left in the condition of suburban property—vacant, unoccupied, and abandoned. During this time the original owners, nor their heirs, paid taxes on that property. The heirs of *Delogny* and *Livaudais* attempted to divide and sell the Islet. The owners of property who derived title from purchasers under the original plan, brought suit to defeat the action of the heirs, on the ground that the rights of the purchasers were paramount and prescriptive.

The controversy involved a consideration of the legal effect resulting from the particular designation of this Islet on the plan, and the non-user of it by the original proprietors and those claiming under them.

The effect of the designation on the plan did not, under the laws of this State, create a dedication to the use of the public, or a servitude in favor of the proprietors. *Eustis, C. J.* *Xiques v. Bujac*, 498.

10. The spot thus designated on the plan for the erection of a church is not a *locus publicus*, but private property. There was no objection on the part of the owners to the erection of the church, and full effect is given to the designation, by considering it a donation in favor of any individual or congregation which might accept it for that purpose. But, if for nearly half a century it has never been attempted or offered to be done, this right is barred by lapse of time—by the prescription of thirty years. Nor can the owners be compelled to keep the place open for the common use of adjoining purchasers of the property, when the right is thus barred. *Eustis, C. J.* *Ibid.*

11. No dedication to public uses can be inferred from the designation of places of public amusement or of public worship, on the plans of towns



DEDICATION (*Continued*).

- and suburbs, as, under the laws of this State, they are invariably private property. *Eustis, C. J. Ibid.*
12. By the Spanish law things established for the service of God were held sacred, and the dominion thereof was not in any person. *Eustis, C. J. Ibid.*
13. In Louisiana all titles to land were, and remain allodial and not feudal. *Eustis, C. J. Ibid.*
14. It is conceded that no particular form of dedication is necessary; but the evidence of the intention to dedicate must be conclusive, and the dedication must be accepted by use or otherwise, in the sense in which it is made; if there was originally a dedication of the land in controversy, which I do not admit, it was a dedication to build a church, which was not accepted in seasonable time for the purpose intended; and the popular conceit, that the land has been acquired to the public by another use not thought of by the grantor, and exercised under the circumstances disclosed by the evidence, is to me an unsatisfactory basis for a judicial action. *Rosl., J. Ibid.*
15. It is not necessary for the city to show title to its common and public property. Such property is usually acquired by dedication and the cessation of all claim to it by the former owner. *Preston, J., dissenting. Ibid.*
16. *Delogny and Livaudais* dedicated the whole of Annonciation Place, including the site of the church, to the public use, forever; the whole was accepted the day the first sale was made by their plan; that dedication has been fully proved by their cessation to claim any part of it as private property, and by the public notorious use of it as public property for forty years before they advertised it for sale. Its destination may be changed by the unlimited sovereign power of the State, but by no other power on earth. *Preston, J., dissenting. Ibid.*
17. When, by natural or other events, a public place cannot be used any longer for the purpose for which it was once destined, and has necessarily lost the legal character which its destination and consequent use had given it—has, perhaps, become a nuisance instead of a public benefit—then the sovereign may change the destination. *Preston, J., dissenting. Ibid.*

## DELIVERY.

1. *B., W. & Co.*, on the third of June, sold cotton to one *S.*, through a broker; but being fearful that the purchase money would not be paid, instead of giving an order for the cotton, in favor of the purchaser, on the proprietor of the press where it was on storage, they gave the order in favor of the broker. On the 5th of June, *S.*, the purchaser, obtained from *C. and R.* an advance on the cotton, and on the 7th of June, a further advance from the same parties. On the 6th of June, *S.* ordered the broker to transfer the cotton on the books of the press, to *C. and R.*, which was done by making an entry: "From *B., W. & Co.*, to *C., R. & Co.*" A part of the cotton had been weighed; the balance had not passed the scales. *S.* absconded, and *B., W. & Co.* refused to deliver the cotton. It was held, that the cotton which had been weighed, was liable for the advances. That which had not been weighed, was not liable.

**DELIVERY** (*Continued*).

For, although it was wholly delivered by *B., W. & Co.* to the broker for the purpose of being delivered to their vendee, yet it was only partly delivered by the broker, to the latter. *Campbell v. Penn.* 371.

2. The delivery of part of a devisable thing, is a delivery of that part alone, and not of the whole. The actual delivery of the whole, in block, completes the sale, even as to third persons, though the article is not counted, weighed or measured. *Ibid.*

See Sale—*McCandlish v. Kirkland*, 614.\* *Judson v. Lewis*, Sheriff, 53.

See Pledge—*Caffin v. Kirwan*, 231.

**DEPOSIT.**

One who has received a sum of money on deposit, cannot plead compensation against the depositor by a debt which did not arise from the deposit. *C. C.* 2927. *Breed v. Purvis*, 53.

**DEPOSITIONS.**

See—*Succession of Franklin*, 395.

**DISCUSSION.**

1. A surety, in exercising his right to point out for discussion, the property of the principal debtor, is not restricted to property within the jurisdiction of the court that rendered the judgment. He may point out any property having the requisite conditions, within the limits of the State.

*Hill v. Miller*, 621.

2. A creditor ought not to be subjected to a troublesome, difficult, and protracted discussion of the property of the principal. The law supposes, that the property designated is in a condition to be made available to the creditor, for the payment of his debt. *Ibid.*

3. A surety who requires the creditor to discuss property, must describe it so particularly as to enable the creditor fully to understand its situation, extent, title, and condition. *Ibid.*

4. The plea of discussion can be made but once. *Ibid.*

**DOMICIL.**

1. The domicile of origin continues until another is acquired, *animo et facto*. He who seeks to establish that another has changed his domicile, must prove it by express and positive evidence; so long as any reasonable doubt remains, the legal presumption is, that the domicile has not been changed. *Rost, J.*

*Succession of Franklin*, 395.

2. The law which fixes the domicile of a person at the place where his principal establishment is situated, means the principal domestic establishment; not that where he may have the largest portion of his fortune. *Rost, J.*

*Ibid.*

3. Intention to reside, coupled with occasional residence of a few days in each year, is sufficient to continue the original domicile. *Rost, J.* *Ibid.*

4. Where there is a doubt on the question of domicile, the original home is to be considered the true home. *Slidell, J.* *Ibid.*

5. A marriage contracted out of the State, between persons who afterwards come here to live, (*s'y établir*), is also subjected to the community of

DOMICIL, (*Continued*).

acquets, with respect to such property as is acquired after their arrival. C. C. art. 2370. For the true sense of the language of the code, the inquiry should be, did *Franklin* and his wife *live* in Louisiana? Were they established here? By the words of the code, we are to understand the *domestic* domicile, the true and permanent home; that domestic hearth, where the husband and wife have surrounded themselves, and their offspring, with the comforts of domestic life; and from which, when he and his wife occasionally depart, for the purposes of business, or pleasure, they do so with the intention to return. *Slidell, J. Ibid.*

6. The act of 1818, added facilities for the acquisition of a residence in this State, but it did not repeal the law of 1816, on the same subject. *Preston, J., dissenting. Ibid.*

7. A declaration, made in the manner pointed out by law, is conclusive of the will and intention to become a citizen and resident of Louisiana. *Preston, J., dissenting. Ibid.*

See Warrantry—*Smith v. Mc Waters*, 145.

DONATIONS AND TESTAMENTS.

See LEGACIES. See WILLS.

EMANCIPATION.

See Slaves and slavery—*Baker v. Taber*, 556.

See Sale—*Carmelite v. Lacaze*, 629.

ERROR.

1. When the inducement for signing an appeal bond is the supposed existence of an order of appeal, which does not exist, the party signing will be relieved on the ground of error. *Sears v. Boyd*, 539.

EVIDENCE.

1. Extracts from books required to be kept by the comptroller of a municipality of the city of New Orleans, although not conclusive of the facts shown by them, are admissible in evidence. *O'Leary v. Sloo*, 25.
2. Parties are at liberty to admit parol evidence of a contract for land, and if they do so, the court will give effect to the same. *Packwood v. White*, 31.
3. The testimony of a single witness is not sufficient alone, to establish a contract of guaranteeing the payment of the price of goods purchased, for an amount exceeding five hundred dollars. *Dickson v. Sharretts*, 54.
4. A party introducing a witness to impeach the testimony of another witness, is not restricted to the simple inquiry as "to the general character of the witness for truth and veracity;" he may inquire into the general character of the witness, whose testimony is sought to be impeached, but cannot inquire into any *particular acts* of an immoral character which may have been committed by the impeached witness.

*State v. Parker*, 83.

5. A person accused of crime, may prove, in his defence, his general good character, and also his character as to such moral qualities as have pertinence to the charge. *Ibid.*

EVIDENCE (*Continued*).

6. Where a notary has been convicted of a misdemeanor in office, by executing a *false* act, the instrument no longer makes full proof; but, until the act is attacked on this ground, it remains authentic and valid in point of form. There are exceptions to this general rule, viz., cases in which one individual personates another, or where an insane person makes a will.  
*Succession of Tete*, 95.
7. An usufruct in real estate or slaves must be established by written evidence; parol proof of its existence is insufficient. *Grier v. Grier*, 103.
8. Where the answers of a party to interrogatories propounded to him in another suit, are offered in evidence against him, an objection to their introduction will not be sustained, upon the ground that he had not an opportunity of explaining himself fully, because the suit in which the interrogatories were propounded was between other persons.  
*Hood v. Chambliss*, 106.
9. Where the plea of *res judicata* has been made, and the judgment relied upon in support of the plea is obscure, it is competent for either party to explain it by parol or other evidence, to show that it either does, or does not, support the plea.  
*Succession of Steele*, 111.
10. The conduct and declarations of both parties to a written agreement, may be admitted to prove a fraudulent simulation. Such is also the rule of the common law.  
*Ray v. Harris*, 138.
11. By the statute of Mississippi, copies of all instruments of writing, which are permitted to be recorded, may be received in evidence. Under this act, a copy of a record is not a copy of a copy. *Smith v. McWaters*, 145.
12. In an action, brought many years after its alleged maturity, to recover the contents of a destroyed promissory note, and the only evidence of the original contract is the testimony of the plaintiff's brother, that the maker acknowledged it; and it also appears that the maker lived two years after the alleged acknowledgment, and was solvent, yet, that no steps had been taken to recover it during his lifetime. Upon such testimony, it was held that the plaintiff could not recover without strong corroborating circumstances.  
*Ward v. Valentine*, 183.
13. If the contract on which the action is brought, is annexed to or made a part of the petition, an objection to the introduction of it in evidence, on the ground of variance, cannot be sustained. *Rugely v. Goodloe*, 294.
14. In a contract for the performance of work, the omission to state the time at which it is to be completed, is an incident which the court will supply according to equity, usage and law; and testimony may be received of those facts and circumstances which tend to show the time for its completion, which the parties may be presumed to have had in view. *Ibid*.
15. The claim was for more than \$500, and proved by only one witness. The application of defendants to the court, to instruct the jury on certain questions of law, as set forth in the record, cannot be construed into an admission of fact by the defendants, and treated as a circumstance corroborating the testimony of the single witness.  
*Keane v. Fisher & Co.*, 334.
16. The affidavit by which the plaintiff obtains the arrest of the defendant will not be received as a circumstance corroborating the testimony of a

EVIDENCE (*Continued*).

- single witness, in an action to recover of the defendants a claim of over \$500. *Ibid.*
17. The defendants asked the charge of the court to the jury on many points, twelve of which implied a sale from the plaintiff to the defendants, and each therefore was a circumstance corroborating the positive testimony of the witness to the plaintiff's claim. Per *Preston, J.*, dissenting. *Ibid.*
18. No one can be bound by testimony not taken contradictorily with him. Therefore, testimony taken between the parties to the suit, before the warrantor is made a party, cannot be used against the latter.  
*Coulter v. Cresswell*, 367.
19. Depositions will not be rejected, on the ground that the cross questions were not answered, where the cross questions were irrelevant to the issue, and of such a character as would have justified the district judge in erasing them from the records of his court. *Rost, J.*  
*Succession of Franklin*, 395.
20. Where the plaintiff alleged, in his petition, that he was of age, and the judge could not have acted on it, unless he was satisfied of the fact, the action of the judge creates a presumption of plaintiff's majority, which can only be overthrown by clear proof of minority.  
*Chandler v. Hough*, 440.
21. In an action against the endorser of a draft, he attempted to prove that the acceptor did not reside at the place where the draft was presented for payment. The evidence was objected to, because the answer contained no allegation under which it was admissible. *Held*: It was admissible under the plea, that the draft had not been protested according to law.  
*Lanata v. Grass*, 522.
22. It is not sufficient for the plaintiff to make out a probable case, he must make it certain. And where the suit is delayed until after the death of the person against whom the claim is alleged to have existed, and where, if it existed at all, it must have been known in his lifetime, the testimony should be peculiarly strong. *Simpson v. Powell*, 555.
23. A signature may be proved by means of comparison with other documents, signed by the party against whom the proof is to be made, whether such other documents are authentic, or their genuineness is first satisfactorily proved.  
*Temple v. Smith*, 562.
24. This doctrine applies, not only to cases when the instrument to be proved is the immediate basis of the action, but also to cases where the instrument is offered as a matter of evidence upon incidental questions. *Ibid.*
25. The testimony of experts, sworn to give evidence upon the comparison of signatures, should be considered, and acted upon with much caution by a jury, who are not bound to surrender their own opinions, formed by their own comparison, to the opinions of witnesses, however experienced. *Ibid.*
26. Testimony that is irrelevant or secondary, will be excluded.  
*Kyle v. Van Bibber*, 575.
27. The question being whether the defendant was a *bond fide* purchaser, the fact that he employed counsel, and that the records were examined, and that he did not take a notarial act of sale, which, in the usual course of business, is accompanied by a mortgage certificate, (C. C. 3328,) but that

EVIDENCE (*Continued*).

he took a private act of sale, is a circumstance calculated, to excite suspicion. *Long v. Martin*, 579.

28. A surety is not a competent witness for his principal.

*Rousseau v. Lovering*, 616.

29. A party who seeks to make another liable for the debt of a third person, must prove such liability with reasonable certainty, or he cannot recover.

*Diggs v. Staples*, 653.

See Account—*Oakey v. Weil*, 169.

See Attorney at Law—*Madden v. Farmer*, 580.

## EXECUTION.

See Judicial Sales—*Price v. Emerson*, 237.

## EXECUTOR.

1. The executor is not bound to deposit in bank the government stocks, nor the bills receivable, of the succession which he administers.

*Peale v. White*, 449.

2. The money of the succession was inconsiderable, being not more than enough to pay expenses. The failure of the executor under these circumstances to deposit in bank, is not a sufficient ground for removing him.

*Ibid.*

3. A testamentary executor, present in the State, but domiciliated out of it, cannot obtain letters of administration out of it without executing his bond with good and solvent security, for such sum, and under such conditions as are required by law from dative testamentary executors.

*Succession of McDonogh*, 472.

4. The code provides, that if the executor has not a general seizin, his commission shall be only the estimated value of the objects which he has had in his possession, and on the sums put in his hands for the purpose of paying the legacies and other charges of the will. Art. 1677. Yet, where the seizin of the property of the succession was not given by the will, but the executors took possession thereof in the absence of the heirs, and the possession was legal and beneficial to the heirs, it was held, that they were entitled to commissions under the article already cited.

*Ibid.*, 475.

5. An executor cannot claim a commission on waste, uncultivated lands; nor can commissions be charged on bad debts, that is, those which are prescribed or due from insolvents.

*Ibid.*

6. An executor who withholds property from the legal heirs, after his executorship has expired, is in bad faith. He, consequently, can claim no compensation for the administration of it while the tortious possession lasted.

*Badillo v. Tio*, 487.

7. The executor charged the succession with one hundred dollars, spent in furnishing the slaves of the deceased with mourning dresses. Held: It was an act proper in itself, and should not have been opposed. *Ibid.*

8. An executor who hired out the slaves of the succession, and, as an overseer, superintended the labor of others, is entitled to compensation for the services thus rendered, over and above the two and one-half per cent commission which the law allows.

*Succession of Pipkin*, 617.

**EXECUTOR** (*Continued*).

9. Where the testator directs, by his will, that slaves be set free, it is the duty of the executor to take care of, treat and support them, until set free, in the same manner that they were treated by the testator. *Ibid.*

See Administrator and Administration.

**EXPERTS.**

See Appeal—*Blanchard v. Blanchard*, 529.

See Evidence—*Temple v. Smith*, 562.

**EXPROPRIATION OF PROPERTY.**

1. On an application by a railroad company to expropriate lands, if it should appear that the company has already a sufficient quantity for its purpose, the court should refuse an order to summon a jury to assess its value; and should such an order be improvidently granted, before action upon it, it is proper for the court to rescind it.  
*Jefferson Railroad v. Hazeur*, 182.
2. Upon such an application it is not necessary for the owner to raise the objection, in his pleadings, that the company has already land enough for its purpose. The court, upon ascertaining the facts, will act upon them and refuse the order, or if granted, rescind it. *Ibid.*
3. The right of expropriation should only be enforced by inches, and upon conclusive proof of the necessity upon which it rests. *Ibid.*

**FRAUD.**

1. When a party has been induced, by misinformation and a suppression of material facts, to take a joint interest in a shipment of merchandise to a foreign port, he is entitled to have the contract annulled, and to recover from the other party any sums he may have paid on account of the shipment.  
*Lopez v. McAdam*, 58.
2. It is out of the usual course of business, and unlawful, for an insolvent merchant to sell his whole stock of goods on long credits, and without any security, to a purchaser who knew the state of his affairs.  
*Beck v. Brady*, 124.
3. The conduct and declarations of both parties to a written agreement, may be admitted to prove a fraudulent simulation. Such is also the rule of the common law.  
*Ray v. Harris*, 138.
4. At the common law, a person who receives property under a fraudulent conveyance, to screen it from the debts of the owner, cannot sustain the conveyance in an action against a subsequent vendee who derives title from a sale of the same owner. *Ibid.*
5. A debtor, in embarrassed circumstances, cannot lawfully place his property out of the reach of his creditors, nor is he justified in distinguishing between them, and leaving the debts arising from his endorsements unsatisfied. And it makes no difference whether a sale, made to accomplish such illegal purposes, was advantageous or not to the creditors. Articles C. C. 1964 and 19, cited and applied. *Stewart v. Lapsley*, 456.
6. The question being whether the defendant was a *bond fide* purchaser, the fact that he employed counsel, and that the records were examined, and that he did not take a notarial act of sale, which, in the usual course of business, is accompanied by a mortgage certificate, (C. C. 3328,) but that

**FRAUD (Continued).**

he took a private act of sale, is a circumstance calculated to excite suspicion.  
*Long v. Martin*, 579.

See *Minors—Christian v. Welsh*, 533.

**GARNISHEE.**

1. Where the citation of a garnishee contained the title of the court, was in the name of the State and under seal of the court, was tested in the name of the judge and signed by a deputy clerk, and directed the garnishee to answer in writing, under oath, the interrogatories annexed to the petition within ten days of the service, otherwise judgment would be entered, &c. It was held to be a sufficient mention of the place where the clerk's office was held, and also a sufficient indication to the garnishee of the place where his answers were to be filed, under the 179th article of code of Practice. *Landry v. Dickson*, 238.
2. Article 252 of the Code of Practice, seems not to require the citation to a garnishee, to be precisely in the same form as the ordinary citation to a defendant. *Ibid.*
3. In proceedings against a garnishee, who has neglected to answer, his neglect is considered in law as a confession, that he has property of the debtor, and neither judgment by default, nor a rule to show cause, is necessary to fix his liability. *Ibid.*
4. The power of answering interrogatories on oath, cannot be conferred on one person by another. *Eustis, C. J., and Rost, J.*  
*Dickson v. Morgan*, 490.
5. A garnishee who is required to answer interrogatories in open court, is entitled to a notice of the order appointing a particular day when his answers are to be made. *Dwight v. Webster*, 538.
6. The doctrine in *Spears v. Nugent*, 2 Ann. 12, applicable to an ordinary party to a suit, was applied in this case to a garnishee called on to answer in open court. *Ibid.*

**GUARANTY.**

1. From the nature and purposes of mercantile guarantees, and the circumstances under which they are usually prepared, it seems improper to subject them to the standard of critical nicety.  
*Menard v. Scudder*, 385.
- 2 A letter in the following words—"I do recommend my friend, *Mr. J. B. Scudder*, of the parish of East Baton Rouge, a planter, and any funds that he may raise, or acceptances, in case he does not pay, I feel bound to pay. *James McCalop*"—contemplates a continuing guaranty. *Ibid.*
3. In the case of a prospective and continuing guaranty, the creditor must not only show, that he advanced his money, or parted with his goods, on the faith of the letter of guaranty, but that he also seasonably notified the guarantor that he accepted the guaranty, and intended to act upon its security. But express and formal notice, emanating directly from the creditor to the guarantor, is not indispensable. If the fact of acceptance is seasonably brought to the knowledge of the signer in any other way, and he acquiesces by silence, it is sufficient. *Ibid.*
4. The death of the guarantor, without notice or knowledge of the fact on the part of the creditor, does not defeat the creditor's right to indemnity for advances made in good faith, after the event. *Ibid.*



# HABEAS CORPUS.

- A judge or court, authorized to issue a writ of *habeas corpus*, cannot refuse bail, by sufficient securities, except for capital offences, where the proof is evident or the presumption great. It is the constitutional right of the prisoner to demand it, and it is not in the discretion of the judge to deny it, nor does the conviction of the prisoner deprive him of the right.

*Longworth, praying for a writ of Habeas Corpus, 247.*

2. The idea, that where a writ of *habeas corpus* is issued, there is an abstract right to immediate action upon it, without regard to circumstances, is wholly untenable.

*State v. Roger, 382.*

# HUSBAND AND WIFE.

1. Where the endorser has been subrogated to the right of a judgment creditor, against a married woman who was the drawer, she will not be permitted to set up the defence against the endorser, that the note was given for the benefit of her husband. This defence should have been urged against the suit in which judgment was rendered against her. If she has a good defence against the endorser, which could not have been urged against the holder, it is her duty to allege and establish that defence by evidence.

*Succession of Dorsey, 34.*

2. Where a wife has obtained judgment against her husband for having sold slaves belonging to her, and having converted the proceeds of the sale to his own use, her property in the slaves must be considered as merged in the judgment.

*Succession of Martin, 45.*

3. Donations between married persons, made during the marriage, are revocable at the will of the donor.

*Shadburne v. Amonet, 89.*

4. Property purchased during the marriage by either husband or wife, is presumed to be liable for community debts, unless the contrary be shown.

*C. C. 2371, Webb v. Peet, 92.*

5. Where a creditor of the husband seizes property as liable for community debts, which the wife claims as having been acquired by her after a judgment of separation of property between herself and husband, it is incumbent upon her to show, affirmatively, the reality and good faith of the judgment of separation, if the creditor attacks it upon the ground of fraud.

*Ibid.*

6. The fruits of paraphernal property belong to the community, so long as the husband retains the administration of it.

*Ibid.*

7. Where the husband buys property at the succession sale of his wife's father, for which he gives his own notes, and they are afterwards received by him in settlement of his wife's share of the succession, she has a legal mortgage against his property for the amount of the notes, provided it is shown, that he was solvent at the time he received them.

*Succession of Tete, 95.*

8. Where the husband claims property purchased in his own name, during the existence of the community between him and his wife, it is incumbent on him to show a clear intention to make an investment on his own account, and this should be so established as to have thrown the loss on him separately, in case the property purchased had been lost.

*Bass v. Larche, 104.*

9. Where a husband, without qualifications or limitation, joined his wife in signing a promissory note, it will be presumed, that he intended to bind

HUSBAND AND WIFE (*Continued*).

- himself for its payment; and not that he merely authorized her to incur the obligation. *Mongel v. Penny*, 134.
- 10 The law gives to the wife a tacit mortgage upon the husband's immovable property, dating from the conversion of her paraphernal funds to his own use. *Gale v. Matta*, 140.
11. Prescription is suspended during marriage, when the husband, having sold an hereditary estate of the wife, without her consent, is bound in warranty for the validity of such sale; and in every case where the action of the wife may be prejudicial to the husband. C. C. 349. *Ibid*.
12. Slight proof of the celebration of marriage is sufficient, where the spouses uniformly, publicly, and for a long time bear to each other the relation of husband and wife. *Hubbell v. Inkstein*, 252.
13. Where a man married two wives, and the second wife was in good faith, each wife is entitled, at the death of the husband, to one-half of the community. *Ibid*.
14. The wife, separated from bed and board, has no need, in any case, of the authorization of her husband. She may make all contracts not prohibited to her, as if she were unmarried. It is, therefore, perfectly competent for her to make a compromise with her husband respecting the property which each party is to retain.  
*Mary C. Nichols v. Her Husband*, 262.
15. The wife is not bound by her signature to a note, signed jointly with her husband, even at the suit of an innocent endorsee, unless it be proved that the consideration of the contract enured to her separate advantage. Nor will the acknowledgment of the wife, in the act of mortgage, that the money had been borrowed for her separate use, relieve such endorsee from the necessity of making that proof.  
*Beauregard v. Her Husband*, 293.
16. The wife, upon a valid claim, obtained judgment against her husband, and also judgment for separation of property; he made a sale in payment of her rights, under the judgment, and the fairness of it was not impeached. The sale was held to be valid.  
*Penn v. Crockett*, 343.
17. Although the law prohibits a wife from becoming the surety of her husband, yet, if after her husband's death, she borrow money to pay his debts, she will be bound to repay it. *Gunst v. Brull*, 649.
18. Where the order of appeal was granted on the petition of a married woman, unauthorized by her husband or the court, and where she and her surety signed the appeal bond without her husband's authorization, the appeal will be dismissed. *Allen v. Landreth*, 650.
19. Where a husband sells the property of the wife, and she appears and makes herself a party to the act, with knowledge of her rights, she thereby consents to the sale. Wives should, under such circumstances, be held to the same rules as other persons, who consent to the sale of their property by another. *Delacroix v. Nolan*, 682.

See Bills and Notes—*Pilcher v. Kerr*, 144.

See Sales—*Shields v. Lafon*, 136.

## INJUNCTION.

1. A plea of compensation, urged as matter of defence, and rejected by the court, cannot, in a subsequent action, be made the basis of an injunction to restrain an execution on the former judgment.  
*Hooper v. Rhodes*, 137.
2. The bond given by one partner to obtain an injunction against his co-partner, is the property of the latter, and not of the partnership.  
*Lowry v. Cobb*, 157.
3. The right of action upon the bond arises immediately upon the dissolution of the injunction.  
*Ibid.*
4. The death of the principal in an injunction bond, is no reason for arresting the suit against the surety: his is a solidary obligation.  
*Ibid.*
5. Where the condition of the injunction bond given by the obligors, is to pay such damages "as the defendant may recover against them"—the phrase "may recover against them," applies to the surety in the same manner as it does to the principals. Recovery against the principals is not a prerequisite, therefore, to an action against the surety.  
*Ibid.*
6. A party who asks relief by injunction, against the entire claim of his creditor, should make such a showing as will distinctly inform the court of the pecuniary extent of his danger. *Leverich v. Citizens' Bank*, 290.

## INNKEEPERS.

1. Innkeepers are responsible only for what is usually and ordinarily in the trunks of travelers—their clothes and the money necessary for their journey. But the landlord is not responsible for the unknown treasure of the traveler, unless placed in his hands. *Simon v. Miller*, 360.
2. The room assigned to a traveler, by an innkeeper, is the proper place for the deposit of his trunk.  
*Ibid.*

## INSOLVENT AND INSOLVENT PROCEEDINGS.

1. An assignment made by an insolvent, which stipulates for an absolute discharge of the assignor, and excludes all those creditors who would not sign such discharge from any participation in the dividends, is null.  
*Riculf v. Delacroix*, 269.
2. Where the insolvent institutes proceedings for a voluntary surrender, and his creditors fail to attend the meeting, it is his duty to apply to the court, at once, to appoint the sheriff syndic. The ten days within which actions of fraud may be brought against him, are to be counted from the day of the appointment of the sheriff. *Woodworth v. His Creditors*, 347.
3. In a contest for the appointment of syndic, the judgment of the court, rejecting the pretensions of an applicant, is appealable.  
*Lesseps v. His Creditors*, 624.
4. A person who holds the notes of an insolvent, is not entitled to vote for a syndic, where it appears, that, on a settlement of accounts, there would be a balance in favor of an insolvent.  
*Ibid.*
5. The wife, in partnership of goods with her husband or her heirs, should not be allowed to vote, in the deliberations of the creditors of the husband, for syndic, unless her rights have been previously settled by a deed of partition, or judgment for separation of goods.  
*Ibid.*
6. An agent, with authority to collect or renew a draft, on which an insolvent is bound, and who has a general authority to "do what he thinks best under the circumstances," is authorized to vote for a syndic.  
*Ibid.*

INSOLVENT AND INSOLVENT PROCEEDINGS (*Continued*).

7. Where creditors, lawfully entitled to vote, have had an opportunity to vote, a new election cannot be ordered for the purpose of letting in new voters, whose lawful claim to vote has been subsequently acquired. *Ibid.*
8. The law gives to every creditor, where there is no cession of property, and to the representatives of creditors, where there is a cession or other proceedings in which they are collectively represented, an action to annul any contract in fraud of their rights. *Townsend v. Miller*, 632.
9. Where a creditor, on his own responsibility, and at his own cost, prosecutes an action to avoid a fraudulent sale made by an insolvent, the benefit resulting from the action cannot be claimed by the syndic who is no party to it. It enures entirely to the creditor, by whose vigilance it was obtained. *Ibid.*

See Sale—*Stewart v. Lapsley*, 456; *Beck v. Brady*, 124.

## INSURANCE.

1. A mortgagee has unquestionably an insurable interest in the property mortgaged. *Keller v. Merchants' Insurance Company*, 29.
2. Where a mortgagee upon a house and lot insures the building against fire, in case of the destruction of the building, query, 1st: Whether the Insurance Company have not the right to insist upon the lot contributing to the satisfaction of the mortgagee's debt? 2d. Whether the Insurance Company upon paying the amount of insurance, have not the right to insist upon a subrogation to the mortgagee's rights? *Ibid.*
3. Where underwriters execute a policy on which, at the time, there is the endorsement of the assured to pay it over to another, it is a recognition of the assignment, which binds the underwriters. An adjustment of the loss, and a promise to pay to the assignee is binding, and an attachment of the money by the president of the company, as funds belonging to the assured, cannot defeat the right of the assignee. *Lapeyre v. Thompson*, 218.
4. An adjustment and a promise by the insurers to pay in accordance with it, is equivalent to a settlement, arbitration or compromise, and concludes the parties. An action may be brought on it, or an action on the policy itself; the adjustment will be evidence of the loss and its amount. *Ibid.*
5. A policy of insurance may be reformed, where it is demonstrated, by legal and exact evidence, that there has been a mistake in filling it up, which has violated the understanding of both parties. But the petition must show by clear and unequivocal allegations, that there was, before the policy was framed, an agreement, a concurrence of the minds of assured and underwriter to protect risks, which were afterwards, by the mistake or fraud of the underwriters, left out of the formal instrument, or else it will be defective, and proof to reform the policy, or vary the risks, will be rejected. *Davega v. Crescent Mutual Insurance Co.*, 228.
6. Conditions attached to a policy of insurance form part of the contract. *Rafel v. Nashville Insurance Co.*, 244.
7. One of the conditions of a policy was in these words: "Goods held in trust or on commission, are to be declared and insured as such, otherwise the policy will not cover such property. Goods on storage must be separately

INSURANCE (*Continued*).

and specially insured." The assured held the goods in pawn, he therefore held them in trust; and, as he made no declaration and insurance, according to the condition of his policy, they were not covered by it.

*Ibid.*

8. A clause in a policy, covering "jewelry and clothing, being stock in trade," does not include such articles as musical instruments, surgical instruments, guns, pistols, books.

*Ibid.*

9. If a ship, soon after sailing, become so leaky as to be unable to proceed on her voyage, and this cannot be ascribed to stress of weather or accident on the voyage, the fair and natural presumption is, that the disability arose from causes existing before setting out on her voyage, and consequently that she was not seaworthy when she sailed. In such cases, therefore, it is incumbent on the assured to show that, at the time of her departure, she was in fact seaworthy, and that her inability arose subsequent to the commencement of the voyage.

*Rugely v. Sun Mutual Insurance Co.*, 279.

10. In case of shipwreck, where the cargo is in condition to reship, and where the means of transportation can be procured within a reasonable time, the master has no legal right to sell; it is his duty to forward the cargo to its port of destination.

*Ibid.*

11. Where there is a legal justification for the master to sell the cargo, yet it is his duty to give such notice, as will warn the public of the time and manner of the sale.

*Ibid.*

12. If, in case of shipwreck, the reshipment of the cargo is proper and practicable, and if, instead of forwarding, the master sell it, the insured cannot abandon and claim for a total, but may recover for a partial loss.

*Ibid.*

13. The insured who violates the condition of his policy, cannot recover from the underwriters.

*Davern v. Merchants' Insurance Co.*, 344.

14. A master, in entering a foreign port where pilots are usually employed, is bound to approach the pilot ground with caution, and to use reasonable diligence to obtain one. If he enters without a pilot, and the vessel grounds and is wrecked in doing so, the underwriters on ship are not answerable for the loss thereby sustained, unless it be shown that reasonable diligence to obtain a pilot was unsuccessfully exerted, or that circumstances of impending danger rendered it unsafe to wait for a pilot, or that such other state of facts existed as would reasonably excuse the omission, by showing its necessity.

*McDowell v. General Mutual Insurance Co.*, 684.

15. The subject of employing a pilot falls under the head of seaworthiness; and that warranty is equally implied, whatever may be the subject of insurance. It applies no less to insurances effected by the owner of goods, than those effected by the owners of the ship.

*Ibid.*

16. The English doctrine of seaworthiness is, that there is no implied warranty of seaworthiness, except at the commencement of the voyage. The law in the principal commercial States of this Union, is at variance with the English rule, gives a wider extent to the implied warranty, and holds it to be the duty of the assured to keep his vessel seaworthy during the voyage, if it be in his power to do so; and if, from the neglect of the owner, or his agents, the vessel become unseaworthy, by damage or loss

INSURANCE (*Continued*).

in her hull or equipments during the voyage, the owner must repair the damage or supply the loss at the port of refuge, refreshment, or trade. The underwriter will be discharged from liability for any loss, the consequence of such want of diligence. The American doctrine is qualified to this extent: that unseaworthiness, arising after the commencement of the voyage, has not a retrospective operation, so as to destroy a just claim in respect of losses which have occurred prior to the breach of the implied warranty; and also, that, if the ship sailed seaworthy for the voyage, subsequent unworthiness shall not operate as a defence, except where the loss is distinctly shown to have been occasioned by it, and the unseaworthiness itself to have arisen from the negligence or misconduct of the assured, or his agents. *Ibid.*

17. A protest is an important instrument; and where a captain, having met with a disaster, prepares and signs one, while the circumstance is fresh in his memory, setting forth the manner of its occurrence; and afterwards, when a litigation, involving a charge of misconduct against himself, has arisen, attempts, as a witness, to account for the disaster by statements of very material incidents of his voyage undisclosed by the protest, his testimony must be viewed with grave distrust, and cannot be considered as satisfactorily verifying the circumstances of the loss. *Ibid.*
18. After the vessel sails, I do not think the insurers of a cargo liable to lose their insurance, for the errors of judgment, mistakes, or even negligence, of the master. The general rule laid down by elementary writers, as Phillips, and even Chancellor Kent, that the failure to take on board a pilot, where it is customary, renders the vessel unseaworthy, and avoids the policy, must be subject, in practice, to this distinction in favor of the insurers of cargo who have no interest in the vessel, or it would be a most unreasonable rule. *Preston, J., dissenting. Ibid.*

## INTERVENOR.

When an intervenor stands in the position of a plaintiff, in a petitory action, he will be bound to establish, by satisfactory evidence, a title to the property which he claims. *Baldree v. Davenport, 587.*

## JUDGMENT.

1. Where a party in an authentic act, confesses the existence of a debt, and authorizes the creditor to enter up judgment without notice or delay, courts have the power, upon the exhibition of such an instrument, to carry into effect the agreement between the parties in the same manner as if the parties were present and confessing in open court. Parties can confess judgment by special power of attorney as well as in person. *Toledano v. Relf, 60.*
2. The judgment of the district court was, that there be a separation of property between the parties, and that the wife recover one-half of the property acquired during marriage. In order to effect a partition, the sheriff was directed to sell the property of the community and to pay one-half of the net proceeds to the wife. There was no specification of the community property in the petition, in the judgment of the court, nor in the evidence; nor was there any settlement of the community.

JUDGMENT (*Continued*).

The judgment of the district court was held to be erroneous; for, by *Slidell, J.*, the judgment, on which the *fieri facias* was issued, did not ascertain what property belonged to the community.

*Lozengeheim v. Martin*, 180.

3. A judgment rendered against an absent defendant, unrepresented by a curator, *ad hoc*, or by a properly constituted agent, will be annulled and set aside.

*Phelps v. Sawyer*, 551.

4. This suit was brought upon a judgment obtained in Mississippi. The statute of limitation was plead in defence. The plea was held to be bad, because the statute did not apply in consequence of the absence of the defendant from the State of Mississippi *Hutchinson's Code*, 831, sec. 11.

*Hill v. Snyder*, 557.

5. When a suit has been brought against A and B, as partners, using the name and style of A and B, upon a negotiable note made by them as partners the judgment obtained will be considered a judgment at common law, *in solido*.

*Ibid.*

6. The court cannot disregard a judgment obtained in Alabama, because the proceedings previous to judgment, if tested by our laws, would be irregular.

*Kyle v. Vanbibber*, 575.

See *Sale—Corcoran v. Riddell*, 268.

JURY.

1. When a judge delivers his opinion to the jury, on facts, it ought to be given as a mere opinion, and not as dictation; the jury should be left to understand clearly that they are to decide the fact on their own view of the evidence, and that the judge interposes his opinion to aid them in the conscientious discharge of their responsible duties.

*State v. Roger*, 382.

2. Even where the jury are justified in allowing exemplary damages, the damages allowed should bear some proportion to those sustained.

*Grant v. McDonogh*, 447.

3. The supreme court disapproved of the district court expressing to the jury the determination to keep it empannelled until a verdict was found.

*State v. Green*, 518.

4. When some of the jurors on the list with which defendant is served, are absent or excused, and the regular panel is exhausted, talismen must be summoned.

*State v. White*, 531.

JURISDICTION.

See *COURTS*.

LANDLORD AND TENANT, AND LEASE.

1. A landlord cannot, in an action against his tenant, seize the property of third persons, on which no storage is due, although it may be found on the leased premises.

*Powers v. Florance*, 524.

2. The offer to return property of a third person, illegally seized by a landlord in an action against his tenant, does not bar the owner from an action for such damages as he may have sustained, in consequence of the illegal seizure.

*Ibid.*

3. Where the claim for rent is based upon the mere occupancy of the defendant, without proof that this occupancy was as lessee, or sub-lessee, a provisional seizure cannot be sustained.

*Blanchard v. Davidson*, 654.

## LEGACIES.

1. The testator had willed his property to two existing benevolent societies, and to found two others, one-fourth to each. Thirty thousand dollars had been set apart by the court of probates, to erect buildings, &c., for the two contemplated institutions. *Held*: That this amount should be deducted from the share of the said two institutions, as universal legatees, and that they were not entitled to that sum, over and above their shares, as universal legatees.

*The Milne Asylum v. The Female Orphan Society et al.*, 19.

2. Where a testator bequeathed immovable property situated in Louisiana, to trustees, to be held by them for the benefit of a charity in Tennessee; where the validity of the bequest is disputed, the trustees should show that the laws of Tennessee do not prohibit similar dispositions from being made in favor of a citizen of Louisiana. *Rost, J.*

*Succession of Franklin*, 395.

3. The trust, created by the testator, was not uncoupled with an interest; the trustees and their descendants, all had a direct interest in the bequest. The effect of such a bequest is not merely to create a perpetuity; it contains an indefinite series of prohibited substitutions. *Rost, J.*

*Ibid.*

4. The bequest, by *Franklin*, to his brothers and their heirs, forever, in trust, of certain property, the revenues to be employed in establishing and maintaining an academy, in Tennessee, to be superintended by the magistrates of Sumner county, and their successors in office, &c., &c., establishes a tenure of property unknown to the laws of Louisiana, highly inconsistent with their spirit, creating an entail, and substantially involving, in a very aggravated form, a prohibited *fidei commissum* and substitution. *Slidell, J.*

*Ibid.*

5. Special legacies are not to be paid out of the portion of the forced heirs; and, where a sum is given by the husband to the wife, in lieu of her interest in his succession, it is a charge upon his general estate. *Preston, J.*, dissenting.

*Ibid.*

6. Where a testator is desirous of becoming the founder of a charitable or educational institution, he does so on the implied condition, that the State will ratify his benevolent intentions. If the confirmation is withheld, the will is defeated; but, if granted, it operates like the accomplishment of all suspensive conditions, whether express or implied, and has a retroactive effect. *Preston, J.*, dissenting.

*Ibid.*

7. Legacies, in favor of corporations, do not lapse, by the incapacity of the corporation to receive, at the death of the testator; the incapacity may be removed, retroactively, by the sovereign. *Preston, J.*, dissenting.

*Ibid.*

8. In the will of the testator there was the following clause: "Two thousand dollars per annum to be paid to the poor of the town of Dunblane, in Perthshire, North Britain. This sum to be divided by the resident minister of the Presbyterian church, and the two highest civil officers in the town, to be paid upon due proof of the acceptance of the trust, say \$2000. Two thousand dollars for the erection of a school-house, in the town of Dunblane, for ten years only, and for the purpose of educating the poor, this being the place of my birth." There were no officers, or



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### LEGACIES (*Continued*).

persons, who, in any legal or judicial sense, would answer the description of the two highest civil officers, in the town of Dunblane. In the courts of Scotland, the legacy would not be sustained, but would be held as lapsed, from uncertainty and the want of proper persons qualified to accept the same. By the Court: It seems, therefore, that as no action can be maintained against the executors, for the recovery of this legacy, they are not authorized to retain the funds of the succession, for the purpose of paying it.

*Henderson v. Rost*, 692.

### LETTING AND HIRING.

1. Defendants employed plaintiff as an architect, in the reconstruction of the cathedral: he was dismissed without cause. *Held*: That the defendants are bound for the full amount of compensation agreed on.  
*DePuilly v. Wardens of the Church of St. Louis*, 443.
2. An employer has the right of dismissing a person whom he employs, at pleasure, and no damages can be recovered for the exercise of that right.  
*Ibid*.
3. Where the overseer does not take the ordinary course of engaging for a fixed salary, the court should reduce his compensation to the lowest sum, which the evidence will justify.  
*Garcia v. Garcia*, 525.

### LESION.

1. No lesion can be predicated of a mere adventure, where there was no deceit, and the parties were equally apprised of the state of facts.  
*Fletcher's Heirs v. McMicken*, 178.
2. In all questions of lesion, the value of the property sold, at the time of the sale, is the rule by which the lesion is to be ascertained. Code 1805. If the value is not fixed within a certain range, by the evidence, the lesion is a matter of conjecture, and must be considered as not proved.  
*Beale v. Ricker*, 667.

### LITIGIOUS RIGHT.

1. Where an attorney at law purchases a judgment which is pending on appeal, it will be regarded as a litigious right, and the purchase declared as void.  
*Mullen v. Amas*, 71.
2. Sale of a litigious right to an attorney, null  
*New Orleans Gas Light Company v. Webb*, 164.

### MANDAMUS.

See Supreme Court—*State v. District Judge of Jefferson*, 184. *State v. District Judge of the Fifth District of N. O.*, 289.

### MANDATE.

1. Where, for a number of years, an agent rendered important service to his principal, although there was no contract for compensation, nor any intention to charge for his services, while their relations existed; yet, where, from their habits of friendly intercourse and from the evidence, it may be inferred that the one intended and the other expected that, upon the termination of those relations, a liberal reward would be made for the services, and the principal died intestate and without making any reward, the agent may recover from the succession a reasonable compensation.  
*Succession of Joseph Fowler*, 207.

MANDATE (*Continued*).

2. The general rule of the Louisiana Code is, that a mandate is gratuitous ; but where, from the nature of the business or conduct of the parties, it appears that no such thing was intended or expected, the law is otherwise. *Ibid.*
3. It cannot be presumed of one who has been released from his debt to a creditor, by a discharge in bankruptcy, that services, subsequently rendered to the creditor, as agent, are intended to be gratuitous ; and the fact that friendly relations existed between the parties, does not assist the presumption. A moral obligation cannot compensate one which is legal. *Ibid.*
4. The purchaser of property who, without authority, pays the price into the hands of the notary, incurs the risk of the deposit ; and where the notary embezzled the money, it was held to be the purchaser's loss. *Brown v. Schmidt*, 349.
5. The secret instructions of a party to his agent, will not qualify the apparent absolute control and dominion with which he has thought proper to invest him. *Slidell, J.* *Campbell v. Penn*, 371.
6. An authority to the agent "to appear before all judges and justices of the peace, in any place or courts, there to do, say, pursue, implead, arrest, attach and prosecute, as occasion shall be or require," does not authorize the agent to acknowledge a debt. *Dickson v. Morgan*, 490.
7. The plaintiff was employed by agents, who disclosed their principals, with whom he corresponded directly, and to whom alone he rendered services. *Held*: That the agents were not bound.

*Gilman v Bonner*, 674.

See Damages—*Camp v. Churchwardens*, 321.

## MARRIED WOMEN.

See Husband and Wife—*Succession of Dorsey*, 34. *Gunst v. Brull*, 649.  
*Delacroix v. Nolan*, 682. *Dubose v. Hall*, 568.

## MASTER AND SERVANT

See Damages—*Camp v. Churchwardens*, 327.

See Slaves—*Baker v. Taber*, 556.

## MINOR.

1. Where the surviving husband by a second marriage, under an order of court in pursuance of a family meeting, sells the community property, which, by subsequent conveyances, gets into the hands of an innocent purchaser, the property thus sold will be freed from the mortgage in favor of the minor by the first marriage of the deceased, of which the husband was co-tutor, although the order of sale was illegally granted, and was subsequently annulled at the suit of the minor ; the cause of nullity being relative merely. *Fabre v. Hepp*, 5-8.
2. Sums paid by a tutor, in the course of his administration, are considered *prima facie* as proper charges against the minor he represents. Where there are circumstances which cast a suspicion upon his good faith, it is otherwise. *King v. Bowen*, 151.
3. A minor who is a party to a fraud, stands on no better footing than one of full age. *Christian v. Welch*, 533.

MINOR (*Continued*).

4. The court will not affirm a judgment in favor of a plaintiff whose case is tainted with fraud, although plaintiff be a minor. *Ibid.*
5. A minor's mortgage, on the property of his tutor, commences from the date of the tutorship. *Drake v. Drake*, 545.
6. The omission to insert the date of the mortgage, in the judgment obtained for the minor against his tutor, cannot affect the legal rights of the minor. It is enough that the right of mortgage should be recognized in the judgment. *Ibid.*
7. The date of the mortgage is established by law, and may be proved *aliunde*. *Ibid.*
8. Minor children, as long as both parents are living, are subjected exclusively to the authority of the father, who administers their property, and who is bound to provide for them and to protect them in their person and rights. *Gates v. Renfroe*, 569.
9. He may delegate a part of the paternal power to the teachers he employs to educate them, but he cannot permanently divest himself of any portion of it by contract. *Ibid*
10. There may be cases in which a court of justice would be authorized to take away this power. *Ibid.*

MONITION.

The 6th section of the act of 10th March, 1834, prescribing the effect of a judgment on a monition, contemplates a judgment which has not been appealed from, and has thus become irrevocable.

*Moore v. Knapp*, 21.

MORTGAGE.

1. Where a judgment rendered with a stay of execution for a certain time, has been recorded in the mortgage office, it operates as a judicial mortgage from the date of its recordation; although the delay for the issuance of the execution may not have expired. *Toledano v. Relf*, 60.
2. Where community property has been mortgaged by a surviving partner in community, for the purpose of raising funds for the maintenance and education of the heirs, pursuant to the advice of a family meeting, which advice was concurred in by the judge of probates, and the property is afterwards sold to satisfy the mortgage, the heirs cannot reclaim it without at least offering to refund the amount for which it was mortgaged, with interest. *Chambers v. Wortham*, 113.
3. Where property has been sold under execution to pay mortgage debts, the mortgages upon the property to which the price was to be applied, are extinguished so far as the property is concerned, and the rights of parties are transferred to the funds. It is not therefore necessary to reinscribe the mortgages to prevent their inscription being barred by ten years' prescription. *Wright v. The Bank of the United States*, 123.
4. In a contest between the wife, who claims a tacit mortgage on immovable property sold by the husband after the right of mortgage accrued, and parties who claim through the privilege of the husband's vendor, the circumstance, that the act from which the privilege resulted, was not recorded, is fatal to the pretensions of the latter.

*Gale v. Matta*, 140.

MORTGAGE (*Continued*).

5. Subsequent mortgagees have the right to dispute any prior mortgage, and to inquire into its validity and amount. They also have the right to ascertain, by action, whether apparent contracts, made between their debtors and other persons, are real, or mere fraudulent simulations. They also have a right, subject to the limitation which the law has prescribed, to an action for the avoidance of contracts, which, although they are real and sincere, were made in fraud of their rights as creditors.  
*Pickersgill v. Brown*, 297.
6. Mortgages, under the hypothecary system of Louisiana, may be given to secure debts having no legal existence at the date of the mortgage. It is not essential, in such a mortgage, even with respect to third persons, that it should express on its face, that it was executed to secure future debts. It may be described as a security for existing debts, and yet used to protect those which, in the contemplation of the parties, were to be created at a future time.  
*Ibid.*
7. Where mortgage property is sold at the instance of a creditor, a previous mortgage creditor is entitled to be paid, by preference, out of the proceeds, unless the seizing creditors prove that the defendant has other property of sufficient value, to satisfy the claim of the prior mortgagee.  
*Deneubourg v. Didion*, 344.
8. In a petitory action, where a mortgage creditor is not a party to the record, no judgment can be rendered in his favor which would be binding on the defendant in the suit.  
*Leverich v. Toby*, 445.
9. Property mortgaged, while held by a simulated sale, must be subject to the mortgages as to the true owners. *Preston, J.* *Ibid.*
10. A judgment was obtained by *Brown* against *Griffin, Cotton, R. A. Hunter, Ford* and *Solibellus*. It was registered thus: "*John Brown v. Spencer Griffin et al.*, Sixth District Court," &c. Held: Such a registry does not operate as a mortgage on *Hunter's* property, because on the face of the inscription, *Hunter's* name does not appear.  
*Ford v. Tilden*, 533.
11. If the inscription, which is in the words of the judgment, is on its face insufficient to show the name of the debtor against whom the judgment was rendered, and whose property it was desired to reach, that which the law intended should inform, leaves the reader in ignorance.  
*Ibid.*
12. The index to the recorder's registry, is no part of the registry, and although *Hunter's* name appears in the index with a reference to the particular inscription in question, yet the error in the registry itself, is not remedied thereby.  
*Ibid.*
13. A minor's mortgage, on the property of his tutor, commences from the date of the tutorship.  
*Drake v. Drake*, 545.
14. The omission to insert the date of the mortgage, in the judgment obtained for the minor against his tutor, cannot affect the legal rights of the minor. It is enough that the right of mortgage should be recognized in the judgment.  
*Ibid.*
15. The date of the mortgage is established by law, and may be proved *aliunde*.  
*Ibid.*
16. When there is no separate book kept by the recorder of mortgages to

MORTGAGE (*Continued*).

record sheriff's bonds, recording the bond in the book of mortgages will be sufficient notice, under the act of 1847.

*Copley v. Dinkgrave*, 595.

17. The 46th section of the act to provide a revenue for the support of the government of the State, provides, that the bond of the collector of taxes shall operate as a legal mortgage on the lands and slaves of the collector. This act attaches the mortgage to the bond itself, and as it is silent as to the manner of recording that mortgage, the usual mode of inscription, in the book of mortgages, will be sufficient. *Ibid.*

18. The probate sale of the separate property of the wife, made for the purpose of paying her debts, and of settling her succession, has the effect of canceling all the mortgages, existing in her name on the property sold. The curator, who administers the succession of his deceased wife, may purchase property at the probate sale. *Aicard v. Daly*, 612.

See Minor—*Fabre v. Hepp*, 5-8.

See Antichresis—*Pickersgrill v. Brown*, 297.

See Sales Judicial—*Leverich v. Toby*, 445.

NEW ORLEANS.

1. A municipality of the city of New Orleans has the power to order sidewalks and gutters, and the proprietors of property in front of which such improvements are made, are liable for two-thirds of the cost of the improvements. *O'Leary v. Sloo*, 25.
2. On the Mississippi river, the levee is, by law, considered as the bank; and the use of the batture between the line of that levee and the stream, is in the public. The commissioners appointed under the act of April 3d, 1832, for the opening of streets, etc., in New Orleans, have no right to assess the adjacent property for opening a street on such batture, the use of which was already in the public. But if the levee be advanced by the municipal authority, and the public use extinguished, the batture would become private property, which, if taken for public use, should be paid for, and the commissioners would have the right to make an assessment for that purpose. *Municipality No 2 for opening Raffenac street*, 76.
3. In making the assessment under the act of April 3d, 1832, for opening streets, etc., the only lots subject to assessment are those adjacent to, or fronting that part of the street so improved. The owners to whose land a new front is given or added to, are only subject to contribution for paying for it. *Ibid.*
4. In authorizing the Mayor and City Council to sell property on perpetual ground rent, the Legislature established a legal destination of the rents, as a portion of the permanent revenue of the city, to enable the municipal authority to exercise its power of police and government. These rents, therefore, cannot be sold under an execution against the municipality. *N. O. and Carrollton R. Co. v. Municipality No. 1*, 148.
5. The act of the Legislature of 1847, required each municipality of New Orleans, annually, in January, specially to appropriate a per centage of the revenues, derived from the markets and wharfage, to the sinking

NEW ORLEANS (*Continued.*)

fund, as established by that act. *Held*: The rate of wharfage cannot be changed during the year.

*Municipality No. 1 v. Steamer Anna No. 2*, 149.

6. The right to establish public places and to change their destination, is an attribute of sovereignty which the Legislature may delegate to corporations. The Legislature of Louisiana has delegated this power to the city of New Orleans, without reservation; under the grant, it is competent for the city government to accept a dedication of public streets, and equally competent for it to annul the acceptance before the streets have been opened, provided no vested right, acquired under the dedication, is affected by the change.

*Municipality No. 3 v. Levee Steam Cotton Press*, 270.

7. By an ordinance of the Second Municipality, passed May 11, 1847, the recorder was empowered to suspend any police officer for dereliction of duty, and report the same to the council.

*Hassard v. Municipality No. 2*, 495.

8. In relation to public places and streets within this city, the municipal authorities represent not only the corporators but also the public; a final judgment against them is a judgment against the public, and no individual can bring the point adjudicated again before the courts. *Rost, J.*

*Xiques v. Bujac*, 498.

9. A judgment against the right of a city to public property, will not bar an individual who was no party to the suit, and who is interested in maintaining the dedication. *Preston, J.* *Ibid.*

10. The municipal authority of the city, has no power to impose a penalty on that which the law of the State has made punishable as an offence.

*City of N. O. v. Miller*, 651.

## NEW TRIAL.

1. Where the opinion of the Court was founded upon its own knowledge of the course of trade, and not on proof of it in the record, the cause was remanded for a new trial by a jury of merchants.

*Greenwood v. Lowe*, 197.

2. The newly discovered evidence, which entitles a party to a new trial, is such as ought to produce, on another trial, a different result on the merits.

*State v. Alvarez*, 283.

3. It is not a sufficient ground for a new trial, that the judge, when the jury returned into court without having agreed on their verdict, instructed them a second time on the evidence, as to matters about which they had made no inquiry, and on the law, as to points on which they had stated neither doubt nor difficulty.

*State v. Green*, 518.

4. An application for a new trial on the ground of surprise, will not be listened to, unless the party applying shall have used due intelligence.

*Wolfe v. Pruitt*, 572.

5. In an affidavit for a new trial, on the ground of newly discovered evidence, the plaintiff swore that he expected to prove notice of the transfer of certain property. The affidavit was held to be defective, because it did not state the time at which the notice of the transfer was given.

*Burton v. Brewer*, 620.

SEE CRIMINAL LAW.

## NOTARY.

See Evidence—*Succession of Tate*, 35.

## NULLITY.

See Insolvent Proceedings—*Reculfs v. Delacroix*, 269.

See Judgment—*Phelps v. Sawyer*, 551.

## OFFICER.

See SHERIFF.

See Surety—*Duncan v. State*, 377.

See Surveyor—Power of the court over—*Dufresne v. Haydel*, 660.

## PARENT AND CHILD.

I am inclined to think, that nothing but a decree of interdiction, should deprive a parent of his child on the ground of insanity. *Preston, J., Rost, J.*  
*In the matter of Celina*, 162.

See Minors—*Gates v. Renfroe*, 569.

See Succession—*Grover v. Clarke*, 174.

## PARISHES—CONCORDIA.

1. The Police Jury of the parish of Concordia had a right to locate the levee on its present site; a reasonable regard for the public safety required it, and therefore the plaintiff has no right to complain. *Salus populi suprema lex est* is the rule. *Zenor v. Parish of Concordia*. 150.
2. The act of 12th March, 1818, to provide further and more effectually for the police of public roads, was repealed so far as it applied to the Parish of Concordia, by the act of the 7th February, 1829. By that act, plenary and unlimited powers were given to the Police Jury of the Parish of Concordia, to make such enactments with regard to roads and levees as it deemed necessary and proper. Under the act of 1818, it was necessary to make compensation to the owner for the land taken for a public road. The act of 1829, in this respect, repealed that act, so far as it applied to the Parish of Concordia. And until the late Constitution, it was competent for the Police Jury of that Parish to take lands for roads, without making compensation to the owners.

*Gillespie v. Freeman*, 350.

## CLAIBORNE.

1. The act of the 18th of March, 1850, does not require that the oath to authorize the clerk of the parish of Claiborne to issue an execution upon a judgment, destroyed by the burning of the court house of Claiborne, should be made by the owner of such judgment, and by no other persons. It requires a statement, under oath, specifying the exact amount of such judgment or the balance due thereon, without saying by whom the oath shall be made. *Wafer v. Wafer*, 541.
2. The attorney who has obtained the judgment, and who has kept a memorandum of it, is a proper person to make the affidavit. *Ibid.*
3. Errors and irregularities in the proceedings and sale by a sheriff, under execution, are cured by the giving of a twelve months' bond. *Ibid.*
4. The proviso in the act of the 18th of March, 1850, "That the person against whom such execution may be issued, shall have the right to enjoin the same, upon making oath that any material statement in the affidavit of the person applying for the execution is not correct; and if such injunc-

PARISHES (*Continued*).

tion be set aside, the person enjoining shall not be liable to any damages except the cost of said injunction," is not applicable to an execution upon a twelve months' bond. *Ibid.*

## PARTITION

It is not enough for the experts to state, generally, that in their opinion the land can be divided in kind; they must point out the manner in which the division is to be made, show the value of the land and buildings, and their nature, and state all the facts upon which their opinion is based.

*Blanchard v. Blanchard*, 529.

## PARTNERSHIP AND PARTNERS.

1. The circumstance that the plaintiff is a concubine of her copartner, does not deprive her of an action for the settlement of its affairs and a participation in profits, derived by capital and labor, which she contributed to the partnership.

*Delamour v. Roger*, 152.

2. One partner cannot bind his copartner by a note, given after the dissolution of the partnership, for a partnership debt. But if the dissolution of the partnership was not known at the time, to the person taking the note, the copartner would be bound.

*Love v. Peany*, 356.

3. To protect one partner from the acts of the other, after a dissolution has taken place, public notice of the dissolution should be given. To those with whom the firm has traded, particular notice is necessary, or notice of the dissolution must be carried home to them.

*Ibid.*

4. When a suit has been brought against A and B, as partners, using the name and style of A and B, upon a negotiable note made by them as partners, the judgment obtained will be considered, at common law, a judgment *in solido*.

*Hill v. Snyder*, 557.

5. When the contract of partnership does not determine the share of each partner in the profits or losses, each one shall be entitled to an equal share of the profits, and must contribute equally to the losses.

*Wolfe v. Gilmer*, 583.

6. The factory of defendants was at Baton Rouge. They had, in connection with it, an office and agency in New Orleans, where they raised funds for the prosecution of their business, and where the partners resided, and where also the membership of *Peale* was well known. *Peale* retired from the company, and gave notice of his withdrawal in a paper published in Baton Rouge, but did not publish his retirement in New Orleans, where *Grinnan* resided. *Held*: A retiring partner is bound to use reasonable diligence, to inform the public. The extent of diligence must be measured with a reasonable regard to the circumstances of the case, and ought not to be brought down to the inflexible standard of publication at the partnership domicile, where such standard would expose the public to an equitable risk. The retiring partner was held bound.

*Grinnan v. Baton Rouge Mills Co.*, 638.

7. *Crockett, Garland & Co.*, dissolved partnership, and *Crockett* went into business with *Maddox*. He gave a note in the name of the new partnership, for a debt of the old firm, of which fact the holder was aware. Suit was brought against the new firm on the note. *Held*: Under such



**PARTNERSHIPS AND PARTNERS (Continued).**

circumstances, it was incumbent upon the plaintiff to have shown that the debt had been assumed by the new firm, for the sake of some benefit or credit derived from the assumption. *Waters v. Maddox*, 644.

See *Rivarde v. Rousseau*, 3.

**PATENT.**

See *Public Lands—Dufresne v. Haydel*, 680.

**PLEADING.**

1. The plea of prescription is not inconsistent with the admission that the debt was once due, nor with the plea of payment and compensation.

*Colley v. Latourette*, 222.

2. Where there was no palpable and radical defect in the citation, the petition to annul the judgment which had been obtained, should contain an allegation, that the defendant had not been legally cited, otherwise it will not be competent to attack the judgment on that ground.

*Landry v. Dickson*, 238.

3. An objection that French is the vernacular tongue of defendant, and that the petition and citation were in English only, must be plead in *limine litis*.

*Ibid.*

4. In this case the plaintiff joined a claim for the price of a slave to his action of boundary. *Per Curiam*: We do not wish to be considered as approving such an impropriety in pleading as this; but considering that substantial justice has been done in this branch of the case, by the judgment of the district judge, we shall not disturb it.

*Savage v. Foy*, 573.

5. Proof of compensation cannot be received where the defendant's plea of compensation is vague and indefinite. Such a plea should state the nature and amounts of the claims, with such precision as to prevent the plaintiffs being surprised

*Maillet v. Martin*, 635.

See *Injunction—Leverich v. Citizens' Bank*, 290.

See *Insurance—Devega v. Crescent Mutual Insurance Co.*, 228.

**PLEDGE.**

1. A debtor may pledge whatever movable property belongs to him, provided it be susceptible of delivery, either actual, fictitious or symbolical, but a thing which is susceptible of neither of those kinds of delivery, is not susceptible of being pledged.

*Caffin v. Kirwan*, 221.

2. The mere agreement of the parties, is not equivalent in any case to a fictitious or symbolical delivery, within the meaning of article 3120 C. C.

*Ibid.*

3. A notarial act of pledge, or a written act registered in a notary's office, is a formality which is necessary to protect the payee against third parties; but its omission is unimportant as between pledgor and pledgee.

*Matthews v. Rutherford*, 225.

**POLICE JURY.**

1. Police juries have the power to lay out and construct roads and to erect bridges, or establish ferries over all water-courses and lakes, whether navigable or not.

*Gillespie v. Freeman*, 350.

See *Parishes—Zeno v. Parish of Concordia*, 150.

**PRACTICE.**

1. The plaintiff brought an action for the removal of obstructions to the natural drainage which the defendant had made, and also for damages. *Held*:

PRACTICE (*Continued*).

That the plaintiff, after dismissing his claim for damages, still had the right to insist upon a judgment for the removal of the obstructions.

*Leonard v. Klempere et al.*, 44.

2. Until final judgment, confirming a judgment by default, has been entered on the minutes of the court, the defendant has a right to move to set aside the judgment by default, and to file an answer.

*Sedden v. Templeton*, 126.

3. Although an action to subject property to the payment of the debts of the succession, on the ground that the possessor holds under simulated conveyances, should be brought by the administrator, and not by the creditors of the deceased, yet where the creditors sue both the administrator and the fraudulent possessor, and the administrator adopts the prayer of the plaintiffs against his codefendant, and asks that the property held by the latter be restored to the succession and sold for the payment of debts in due course of administration: in such a case, the creditors are competent to sue.

*Walworth v. Succession of John Snodgrass*, 136.

4. An answer was filed after the exception had been taken to the plaintiff's action. *Held*: In determining on the exception, the court was bound to take cognizance of the pleadings as they then stood. *Ibid*.

5. Where the whole account has been referred to an auditor, it is error in the court to permit the counsel to divide it and try the case on a portion of it.

*King v. Bowen*, 151.

6. Where a party seeks to homologate the report of auditors, and, in his motion, makes reservations which leaves the matters upon which the report is based, vague and uncertain and open to future litigation, a judgment homologating it will be equally vague and uncertain, and should not therefore, be rendered. *Ibid*.

7. The petition alleged indebtedness on a claim; a supplemental petition alleged that the claim had been reduced to judgment, thus showing, that the ground of action in the original petition, was extinguished. The plaintiff could not so amend, for it changed the cause of action, and altered the substance of the demand.

*Dennistown v. Payne*, 333.

8. A mortgage claim had been reduced to judgment in Mississippi, suit was afterwards brought upon the claim in Louisiana. The court held, that the claim was merged in the judgment, and that the action should have been on the latter and not on the former. *Ibid*.

9. Where the privilege claimed is one resulting from the nature of the obligation, it pertains to the merits, and may be tried with them.

*Slark v. Broom*, 337.

10. A person who voluntarily makes himself a party to a suit already pending, claims a privilege upon the property attached, sequesters and bonds it, neglects to defend the suit, and suffers judgment to go against him on the bond, cannot defeat that judgment on account of the irregularities of the plaintiff's proceedings. These irregularities should have been urged, as matters of defence, before judgment.

*Kirkland v. Boyle*, 369.

11. In an action against the owners of a vessel for damages, resulting from the improper conduct of the master to a passenger, the owners cannot be brought into court by a service of the citation on the master, or on the consignees.

*Fellows v. High*, 451.

PRACTICE (*Continued*).

12. Suit on a physician's account. Defendant excepted to the petition on the ground that there was no bill of particulars. The exception was overruled. *Held*: That the court erred. *Shields v. Richardson*, 535.
13. He who sues a married woman, must allege and show, that she is separate in property from her husband, by marriage contract or by a judgment of court, as the case may be, and without that showing, he will not be able to maintain his suit against her personally, or charge her separate estate. *Dubose v. Hall*, 568.
14. A plaintiff who brings an action for the resolution of a sale, on account of the non-payment of the price, after having brought suit upon one of the notes, given in payment of the price, may, at any time before going into the trial, discontinue one of the actions, and proceed with the other. The suit upon the note will be a sufficient putting in *mora*, and its effect will not be impaired by the discontinuance. *Ibid*.
15. Under article 626 of the Code of Practice, orders of execution must be sealed with the seal of the court. *King v. Baker*, 570.
16. When the defendant has been personally cited, the court is bound to presume that the subsequent proceedings and judgment are regular and in conformity with the laws and practice of the place where the judgment was rendered. *Kyle v. Vanbibber*, 575.
17. In possessory actions, when possession is claimed under title, and the calls of the title are not natural, or at least visible and fixed, a survey of the land is of great assistance to a proper determination of the extent of the possession. *Copley v. Bonner*, 578.
18. Plaintiff, who sues as liquidator on a contract made with a firm, must prove his authority to sue as liquidator, although it be not specially denied. *Suydam v. Kinney*, 621.
19. Where the proceedings in a case had been conducted irregularly, for more than a month, at such times as suited the convenience of the parties and the leisure of the court, the circumstance that the court received the testimony of witnesses, after the plaintiff's counsel had concluded his argument, is not, where the plaintiff sustains no injury, a good ground of exception. *Hill v. Miller*, 621.
20. The admission in the answer, that services were rendered, is not an admission of their value. *Stillman v. Waterman*, 656.
21. The defendant's commission had been out eighty-two days, and no excuse for the delay was shown, and the district judge was of opinion that due diligence had not been used. *Held*: That defendant was properly ruled to trial. *Stackpole v. Wickham*, 678.
22. The verdict was written on the back of a document attached to a petition, instead of being written on the back of the petition itself. This circumstance was not urged as a ground for a new trial. *Held*: The ground of nullity, set up for the first time in the Supreme Court, is too frivolous to deserve further notice. The document was annexed to the petition, and may fairly be viewed as a part of it. *Ibid*.

See CONTINUANCE.

See Prohibition—*State v. Cassidy*, 590.

See Warrantry—*Oliver v. Bry*, 590.

See Garnishee—*Landry v. Dickson*, 538. *Dwight v. Webster*, 538.

## PRESCRIPTION.

1. Where an endorser has been legally subrogated, by payment of a judgment to the rights of the creditor against the drawer, the note is merged in the judgment, and is not barred by the prescription applicable to promissory notes. *Succession of Dorsey*, 34.
2. Informalities in a sheriff's sale, of the property of a succession, are prescribed by five years, by the act of 10th March, 1834. *Chambers v. Worthen*, 113.
3. Prescription is suspended during marriage, when the husband, having sold an hereditary estate of the wife, without her consent, is bound in warranty for the validity of such sale; and in every case where the action of the wife may be prejudicial to the husband. C. C. 349. *Gale v. Matta*, 140.
4. The code suspends prescription during minority. It does not except from suspension the prescription of fifteen years. This suspension extends to non-resident as well as to resident minors. *Smith v. McWaters*, 145.
5. In an action for services rendered, to which there is a plea of prescription, it is no defence to the plea to show, that a part of the services were rendered within the prescriptible term. *Colley v. Succession of Latourrette*, 222.
6. Article 3485 of the the code provides, that if the plaintiff after having made his demand, abandons or discontinues it, the interruption of prescription shall be considered as having never happened. Held: The expression abandoned, means an active abandonment, and not such an abandonment as may be implied from the absence or default of the litigant, at the time of the trial. *Norwood v. Devall*, 523.
7. The acknowledgment of a debt, in order to interrupt prescription, must be specific. Loose and vague conversations will not operate an interruption or renunciation. *Cane v. Reynolds*, 537.
8. A mortgage given directly in favor of the Union Bank for a loan of money, comes under the letter of the Act of 1843, and need not be reinscribed. *Union Bank v. Dosson*, 548.
9. When an obligation is *prima facie* prescribed, there must be authentic evidence of the interruption of the prescription, before the party in whose favor the obligation is made can proceed by the *viâ executif*. *Ibid.*
10. The receipts of the cashier of a bank upon such an obligation, would not even be admissible to prove the interruption of prescription in an ordinary suit. *Ibid.*
11. Judges are not authorized to supply the plea of prescription; but, after the time required to sustain that plea has intervened, slight evidence of payment, or of the remission of the debt, is sufficient to satisfy the mind. *Succession of Dufour*, 648.
12. This suit was brought to make a son liable for a debt due by his father, on the ground, that he (the son) had received a large portion of his father's property during his lifetime, upon condition of paying his debts, and had, after his death, intermeddled with his succession, and converted its property to his own use. The prescriptions of three and five years, under articles 1176, 1390, and 3507 of the Civil Code, do not apply. *Stephenson v. Wilson*, 553.

**PRESCRIPTION (Continued).**

13. The suit was brought upon a judgment obtained in Mississippi. The statute of limitations was plead in defence. The plea was held to be bad, because the statute did not apply in consequence of the absence of the defendant from the State of Mississippi. *Hutchinson's Code*, 831, sec. 11.  
*Hill v. Snyder*, 557.
14. The following was the form of the note on which defendants were sued:  
"Natchez, January 27, 1839. On the first of March after date, we, or either of us, promise to pay the president, directors and company of the Planters' Bank of the State of Mississippi, for value received, \$63,945 payable and negotiable at the Planters' Bank of the State of Mississippi, at Natchez. MARY M. ELLIS, administratrix of T. G. Ellis, deceased; JOHN ROUTH, ELIAS OGDEN." Held: Under our laws, an instrument of this kind would be applied to contracts made out of the State, when sought to be enforced in our courts. *Bacon v. Dahlgreen*, 599.
15. The prescription of the forum or place where the remedy is sought, must govern in all suits for the collection of debts. But this rule does not conflict with the well recognized doctrine, that a title to movable property complete in the party, acquired by prescription resulting from possession, or otherwise, will enable him to recover the same, in a State other than that in which the right of ownership has been thus acquired.  
*Ibid.*
16. A surety on a note, when sued in Louisiana, cannot defeat the action by showing that the principal debtor had sustained a plea of the statute of limitations, to an action brought on the same note in Mississippi.  
*Ibid.*
17. The note sued on, although not payable to order or bearer, is negotiable, under the laws of Mississippi, and the prescription of five years is a bar to an action brought on it in this State. *Preston, J.*, dissenting. *Ibid.*

See Bills and Notes—*Brian v. Spencer*, 136.

**PRIVILEGE.**

1. The vendor has no privilege, unless his act of sale be recorded in the office for recording mortgages. *Leflore v. Carson*, 60.
2. Where it is agreed between the proprietor and contractor for the building of a house, that in case of disagreement between them, the controversy is to be settled by arbitration, and they do submit their dispute to arbitrators, who render their award before the proprietor has received notice from workmen and others claiming a privilege for the amounts due them, not to pay the contractor, those creditors cannot complain of the award, unless they can show, conclusively, that injustice has been done them. The creditors can only claim their privilege upon what is justly due to the contractor under the contract. *McLaughlin v. Goodchaur*, 101.
3. A shipment made under a contract, that the proceeds should be applied to reimburse advances made on it by the consignee, and to pay certain named creditors of the consignor, creates a right in favor of the consignee and those creditors on the proceeds, superior to that of an attaching creditor. *Hopkins v. Pratt*, 336.
4. Although the freighter may have a privilege on the vessel for a non-delivery of the cargo, he has no privilege on the insurance money due under a policy covering the vessel. *Slark v. Broom*, 337

## PRIVILEGE (Continued).

5. Although the advances be not simultaneous with the possession, the privilege attaches as soon as possession is required, in pursuance of the antecedent promise, and is effective when adverse rights have not in the meantime been acquired. *Slidell, J. Campbell v. Penn, 371*
6. Judgment cannot be recovered against the owners of a steamboat, on a note given by the clerk, although on its face it purports to have been given for stores furnished the boat. If the note is relied on to bind the owners, as a receipt for stores, it must be proved that the clerk who made the note was clerk at the time that they were received. *Anderson v. Irwin, 494.*
7. A note, given by the chief clerk of a steamboat for stores, is such a settlement of the account, as interrupts the prescription under article 3499 of the code. *Preston, J., dissenting. Ibid.*
8. Overseers have a privilege on the crop which they have made for their wages, whether in the hands of the original or third parties. *Garcia v. Garcia, 525.*
9. The agent exceeded the amount which he was authorized to spend for the expense of a plantation. *Held*: That third persons furnishing necessary supplies, or incurring expenses for the crop, had a privilege on it for payment, notwithstanding there was an antichresis recorded on the property in the parish where it was situated. *Ibid.*
10. The privilege for freight, conferred by article 3213 of the Civil Code, extends only to goods of which the Captain has, or has had, possession. *Granger v. Campbell, 611.*
11. A factor has a privilege upon the crop of the current year for all necessary supplies furnished to the plantation of his principal. C. C. 3184. Act of March 23, 1843, p. 44. *Carter v. Baker, 547.*
12. The vendor's privilege does not extend to personal property which has passed into the hands of a third purchaser, although such purchaser may have known of the embarrassed circumstances of his immediate vendor. *Hayes v. Crockett, 645.*
13. Privilege against a steamboat, for cord wood furnished by contract, allowed, under the act of the Legislature of the 15th March, 1842. *Payne v. The Independent Towboat Co., 671.*

## PROHIBITION.

Where it does not appear by the petition for a writ of prohibition, that the sheriff was about to sell the property seized, before the final disposition of the injunction suit, the object of which was to restrain him from executing the judgment, but merely that he was about to close up the house seized, the writ will not be granted. *State v. Cassidy, 273.*

## PUBLIC LANDS.

1. It would introduce infinite public mischief, were the court to decide that the confirmations by the commissioners and Congress, made expressly to those who claim by derivative title did not operate to their own use. *Heirs of Thomas v. Phillips, 546.*
2. If the adjudication by a commissioner in favor of the claimant, duly authorized by Congress to make such a decision, would be final, the court cannot perceive why a decision and confirmation by Congress itself should not be equally valid and final. *Ibid.*

PUBLIC LANDS (*Continued*).

3. The husband of the plaintiff, having 155 80-100th acres in his front tract, paid into the hands of the receiver of public monies, \$145 75, for a certificate of the entry of 119 acres of the lands in his rear. *Nicholas Haydel*, under whom the defendant holds, owned a front tract, containing 249 54-100th acres, and paid into the hands of the receiver of public monies, the price of 248 acres, for his entry of the back lands. The whole quantity of land in the rear, subject to their entries, was 322 48-100th acres. Of this quantity, a surveyor of the United States allotted to *Haydel* 243 20-100th acres, and *Dufresne* 79 28-100th acres. His survey was approved, March, 1831, by the surveyor of public lands, and a patent was issued to *Haydel* for 243 20-100th acres of the land, in 1845. The plaintiff claimed that the land should have been divided proportionably to the quantity in the front tracts, and brought suit to obtain that division. Her action was sustained. *Held*: The authority given, by the act of Congress, to the surveyor, to make an equitable division of the land between the claimants, is in affirmance of the act authorizing each [front proprietor] to purchase an equitable portion of the land, [in his rear], and neither adds anything to, nor takes anything from, the rights of the parties; he is a ministerial officer, bound to perform this duty, not as he may choose, but equitably; and if he do not, the injured party may resort to a court of justice, or there would be a right without a remedy, in derogation of the first article of our Code of Practice.  
*Widow Dufresne v. Haydel*, 660.

4. The act of Congress expressly entitles the plaintiff to an equitable division of the back lands with the only proprietor whose claim came in conflict with hers. *Ibid.*
5. In the sale of the public lands, the government and its purchasers must be governed by the same principles which apply to individual vendors and vendees. *Ibid.*
6. When a patent issues, it irrevocably divests the government of title, in favor of the patentee; but if the land already belongs to an individual, either by sale or legal confirmation, the subsequent issue of a patent to another person, enures to the benefit of the true owner. *Ibid.*

## RATIFICATION.

1. Where a wife has obtained judgment against her husband for having sold slaves belonging to her, and having converted the proceeds of the sale to his own use, her property in the slaves must be considered as merged in the judgment. *Succession of Samuel Martin*, 45.
2. In this case, defendant claimed a credit for a payment made to the sheriff in Mississippi, and endorsed upon the execution. By the Court: "It has been held by the Court of Errors and Appeals in the State of Mississippi, and by the Supreme Court of the United States, in a case coming from that State, that lapse of time was sufficient ground for inferring the implied sanction of the plaintiff to the act of an officer who had collected uncurrent notes." We will, therefore, amend the decree which has been rendered in this case, by allowing the aforesaid credit.

*Hill v. Snyder*, 557.

## RECORDING TITLES.

See Judicial Sales—*Buchanan v. Morgan*, 454.

## RECORDER OF MORTGAGES.

See MORTGAGES.

## REDHIBITION AND REDHIBITORY SUITS.

1. Dirt eating is not a disease, but merely the cause of a disease. It is not, therefore, necessarily a redhibitory vice, which should annul the sale of a slave. *Demoruelle v. Sugg et al.*, 42.
2. A suit to rescind the sale of a slave, cannot be sustained where the plaintiff has been guilty of neglect in not promptly giving her the benefit of medicinal treatment. *Hooper v. Owens*, 206.
3. Article 2497 of the Code, which excludes from the class of redhibitory vices those defects which are apparent, does not relate to such defects as are concealed by reason of the thing purchased being in a box, barrel or package. *Richards v. Burke*, 242.
4. The plaintiff, in a redhibitory action, cannot recover the expense for the transportation of the slave from the place where bought, to where he died. *Coulter v. Cresswell*, 367.
5. Redhibitory suit. Plaintiff was aware of the nature of the disease three weeks after the sale, but no physician was sent for until the day preceding the death of the slave. Held: Plaintiff was not entitled to recover. *Winfield v. Little*, 536.
6. In an action to recover the price of a slave, on the ground that he was unsound at the date of the sale, the plaintiff cannot recover where no *post mortem* examination was made, and the proof of the nature and duration of the disease rested exclusively upon the conjectural and conflicting opinion of physicians. *Stackhouse v. Kendall*, 670.

## REGISTRY.

See Judicial Sale—*Buchanan v. Morgan*, 454.See Mortgages—*Ford v. Tilden*, 533.

## RES JUDICATA.

1. An account of executors, duly homologated, is *res judicata* between the executors and legatees, but it is not so as to the legatees *inter se*. *Milne Orphan Asylum v. Female Orphan Asylum*, 19.
2. A judgment, pending an appeal, will not sustain a plea of *res judicata*. *Bacon v. Dahlgreen*, 599.

See New Orleans—*Xiques v. Bujac*, 498.

## SALE.

1. A member of a commercial firm brought real property in his own name, for which he paid in a note of his firm. He afterwards sold the lot to a third person. The other members of the firm brought suit against the syndic of the purchaser to recover their virile shares, upon the ground that the act of sale showed the property was paid for by the firm, and belonged to the firm jointly, and that it could not be legally sold by one of the partners. Held: That the recital in the act of sale was not sufficient notice to the purchaser to invalidate the sale. *Rivarde v. Rousseau*, 3.
2. The father held certain slaves under a deed of trust executed in Mississippi, binding him to hold them for the use and benefit of a son and daughter, and upon the majority or marriage of the children, to execute



SALE (*Continued*).

a conveyance to them. He removed to Louisiana, and by some means, parted with the possession of the slaves. They were subsequently transferred several times; suit was instituted by one of the children, and the heirs of the other, for the slaves, against the person who, at the time, had them in possession. The defendant and his warrantor, proved more than ten years' possession in good faith, and under a just title. *Held*: The legal title to the slaves was vested in the father by the deed of trust. When brought by him to this State, they became subject to our laws, which recognize no such right of property as that claimed by the plaintiffs.

*Richard Terrell v. James J. Allen*, 46.

3. The plaintiff had sold a slave, having with her a young child. In the act of sale, no mention was made of the child. He instituted suit for the child. *Held*: That as the right to rescind the sale of the mother was not claimed in the suit, and that, as it appeared, the purchaser was aware of the existence of the child at the time of the sale, the plaintiff must be regarded as the owner of the child, and was entitled to its possession when it reached ten years of age, or upon the death of the mother, if she died before that time; and that, in the meantime, the purchaser must bear the burden of supporting the child.

*Terrebone v. Walsh*, 61.

4. A sale cannot be annulled for the non-payment of a portion of the price, where the parties, from their transactions, have rendered it impossible to place each other in the same situation they were in before the sale was made.

*Leflore v. Carson*, 65.

5. To constitute a valid delivery, the consent of the seller must be made to appear. The mere taking possession of the thing sold by the purchaser, without the consent of the seller, does not amount to a delivery.

*Judson v. Lewis, Sheriff*, 55.

6. The plaintiff brought suit against the sheriff for a trespass, in levying certain attachments against a third person, upon his property. The sheriff called the attaching creditors in warranty. The plaintiff had purchased the property of the debtor. *Held*: That, as the attachments were levied before the delivery of the property to the plaintiff, he had no right to obstruct, or embarrass, the process of the court against the debtor.

*Ibid*

7. It is out of the usual course of business, and unlawful, for an insolvent merchant to sell his whole stock of goods on long credits, and without any security, to a purchaser who knew the state of his affairs.

*Beck & Co. v. Brady*, 124.

8. The retrocession, by the surviving spouse, of property purchased during the community, will, if necessary on account of the debts of the community, be valid. The failure of the heirs to show that there is property to satisfy the debts, raises the presumption that the retrocession was not a voluntary act, but *ex causa necessaria*.

*Shields v. Lafon*, 135.

9. The heirs of the deceased spouse cannot annul an act of retrocession, made by the survivor for the purpose of paying the debts of the community, without tendering the price of the property, and the interest due on it, up to the day of the retrocession.

*Ibid*.

SALE (*Continued*).

10. The sale of a litigious right to an attorney not competent to purchase, is a nullity. But the sale does not annihilate the obligation of the debtor of that right; he is still bound to the vendor. It is the sale of the litigious right, and not the right itself, which the law avoids.

*Gas Light Co. v. Webb*, 164.

11. A person who makes and sells a machine in violation of the rights of the patentee, cannot maintain an action to recover the unpaid purchase money. Nor can the purchaser, who has been prevented by the patentee from using the machine, recover from the vendor the purchase money, where from the circumstances he should have known that the vendor had no right to sell.

*Bell v. Bounney*, 170.

12. A purchaser of land, who suffers it to be seized and sold as his own, who buys it in and sells it again, cannot be relieved from paying the purchase money to his vendor, on the ground that there are encumbrances upon it.

*Oakey v. Drummond*, 205.

13. Where the plaintiff purchased potatoes, in barrels, and shipped them to Shreveport, and, on opening the barrels there, the potatoes were found to be in a rapidly decaying condition, it was held, that the plaintiff could rescind the sale without offering to return them,

*Richards v. Burke*, 242.

14. The plan, by which the vendor sells property, forms a part of the title conveyed by him, and he warrants whatever may fairly be inferred from it.

*Keay v. Canal and Banking Co.*, 259.

15. The vendor of a judgment, who stipulates against any recourse or claim whatsoever against him, is not relieved from the implied warranty of the existence of the debt at the time of the transfer, in the form in which it purported to exist, that is to say, in the form of a judgment.

*Corcoran v. Riddell*, 268.

16. Even in case of stipulation of no warranty, the seller, in case of eviction, is liable for a restitution of the price, unless the buyer was aware at the time of the sale of the danger of eviction, and purchased at his peril; and this principle of the contract of sale, applies not only to the sale of corporal things, but also the sale of a debt.

*Ibid.*

17. Where the seller is in good faith, and the purchaser is evicted of the thing bought, the measure of damages against the former, is the restitution of the price and the costs of the action under which he was evicted.

*Ibid.*

18. A suit for the rescision of a sale, on the ground that the vendor promised to release existing mortgages before the payment of the first note, cannot be sustained where the vendor had made no offer to pay the first note, and where there is no evidence of what the mortgages are, of which he complains.

*Hills v. Mooney*, 290.

19. *B., W. & Co.*, on the 3d of June, sold cotton to one *S.*, through a broker; but being fearful that the purchase money would not be paid, instead of giving an order for the cotton, in favor of the purchaser, on the proprietor of the press where it was on storage, they gave the order in favor of the broker. On the 5th of June, *S.*, the purchaser, obtained from *C. and R.* an advance on the cotton, and on the 7th of June, a further advance from the same parties. On the 6th of June, *S.* ordered

SALE (*Continued*).

- the broker to transfer the cotton on the books of the press, to C. and R., which was done by making an entry: "From B., W. & Co. to C. R. & Co." A part of the cotton had been weighed; the balance had not passed the scales. S. absconded, and B., W. & Co. refused to deliver the cotton. It was held, that the cotton which had been weighed, was liable for the advances. That which had not been weighed, was not liable. For, although it was wholly delivered by B., W. & Co. to the broker for the purpose of being delivered to their vendee, yet it was only partly delivered by the broker, to the latter. *Campbell v. Penn*, 371.
20. The agreement amounts to the sale between the parties; the delivery completes it as to third persons. *Ibid*.
21. The delivery of part of a divisible thing, is a delivery of that part alone, and not of the whole. The actual delivery of the whole, in block, completes the sale, even as to third persons, though the article is not counted, weighed or measured. *Ibid*.
22. A debtor, in embarrassed circumstances, cannot lawfully place his property out of the reach of his creditors, nor is he justified in distinguishing between them, and leaving the debts, arising from his endorsements, unsatisfied. And it makes no difference whether a sale, made to accomplish such illegal purposes, was advantageous or not to the creditors. Articles C. C. 1964 and 19, cited and applied.  
*Stewart v. Lapsley*, 456.
23. Ambiguous or obscure clauses in the contract of sale, are interpreted against the seller, who is bound to explain himself clearly as to the extent of his obligations. Code, 2449. *Gray v. Lowe*, 465.
24. Where, under two contracts, the purchaser bought two parcels of drafts, his right to one of the drafts being afterwards questioned, it was held, that his failure to establish by which of the contracts he obtained the draft, did not invalidate his title, where it was clear that he had obtained it under one or the other of the contracts. *Ibid*.
25. The sale of a draft, with a privilege reserved to redeem it within a certain time, is valid. *Ibid*.
26. Where property is sold by a plan, the ideas which it conveys are as binding on the vendors, as the words in a deed of conveyance. *Preston, J.*  
*Xiques v. Bujac*, 498.
27. It is an elementary principle, that there is no *vente à reméré*, unless the right to take back the property, on refunding the price, be stipulated in the act of sale, so as to form one of the reservations of it; and that if the stipulation is appended by a subsequent act to a sale originally pure and simple, it is either a re-sale, or a promise to sell.  
*Pitts v. Lewis*, 552.
28. The equitable doctrine established in the case of *Pepper v. Dunlap*, 5 Ann. 200, that when a purchaser, who has received possession from his vendor, buys, afterwards, an outstanding and superior title, and thus perfects and quiets the defective title, and the possession which he received from his vendor, the second purchase will enure to his vendor's benefit, does not apply to a case in which the vendor never had, and gave no possession, and was aware of an outstanding title, and knew that he was selling what belonged to another. *George v. Roach*, 594.

SALE (*Continued*).

29. If the vendor retain possession of the thing sold, it is liable to seizure for his debts. *McCandlish v. Kirkland*, 614.
30. The transferee is only possessed, as regards third persons, after notice has been given to the debtor of the transfer having taken place. C. C. art. 2613. And an execution may be properly levied by creditors, previous to such notice. *Burton v. Brewer*, 620.
31. A condition in the act of sale of a slave, that the purchaser shall emancipate him after a specified time, is valid, and ensures to the benefit of the slave; the right of property is transferred to the purchaser, subject to the slave's status. If, however, the right of emancipation should be defeated or terminate, from any cause independent of the acts of the purchaser, the slave remains his property. *Carmelite v. Lacaze*, 629.
32. To constitute a sale *per aversionem*, there must be either a distinct or separate object described, such as the manor of dale, an island, an enclosed field; a sale is also considered as made *per aversionem* when it is for a total sum, and assigns to the land sold existing and visible boundaries, such as rivers, highways, fences, pieces of stone, iron or wood, showing the starting point and direction of the dividing line with the adjoining tenements. These last sales are held to be *per aversionem*, on the presumption, that the parties to them have their attention fixed, rather upon the boundaries than upon the enumeration of quantity. *Boyce v. Cage*, 672.
33. When two pieces of ground have been sold by one and the same contract, with the expression of the measure of each, and there be found a less quantity in one and a larger quantity in the other, the deficiency of the one is supplied by the overplus of the other, as far as it goes. C. C. 2475. *Ibid*, 674.

See Warranty—*Jenkins v. Parish of Caddo*, 559.

## SALES JUDICIAL.

1. The notice to be given to the creditor, of the seizure of property under execution, is no part of the proceedings which a purchaser at sheriff's sale is bound to heed or examine. It is for the benefit of the debtor in execution *exclusively*, and may be waived by him without prejudicing the rights of a purchaser, or vitiating his title. *McDonogh v. Garland*, 143.
2. The object of notice to the debtor is, to apprise him what property the sheriff takes in execution, and of which he claims to take possession by virtue of the seizure. *Ibid*.
3. A note which has been filed in a court of justice by a party litigant in a suit, cannot be seized under execution against a third party who has no apparent title to the property seized. *Price v. Emerson*, 237.
4. By the terms of a judicial sale, purchasers were, in substance, required to take the property subject to so much of the antichresis as might be due, and such of the recorded mortgages as, upon investigation, should turn out to be *bond fide*. *Held*: Under such description of the interest, its value was altogether undefined. It is the right of the debtor, under the

SALES JUDICIAL (*Continued*).

law, that his property should be sold at a certain price. Here the price was uncertain—it was not sold for so much over the amount of mortgages stated in the certificates, but a bid for so much money, subject to such amounts as might be *bond fide* and really due under them. The sale was, therefore, defective. *Pickersgill v. Brown*, 297.

5. In judicial sales, there must be a definite description of the thing sold. The law will not countenance their being made lotteries, at the bidding, and sources of confusion and strife afterwards. *Ibid.*
6. Where a creditor causes a sale of an indefinite and uncertain interest in property; becomes the purchaser, under a title defective on its face; takes no possession of the thing purchased, and no ratification of the proceedings is shown to have been made by the defendant in execution—in an action by the purchaser, restraining a mortgagee from the enjoyment of his apparent rights in the property, and calling upon him to account, it is competent for the mortgagee to set up the defects in the judicial sale under which the purchaser claims. *Ibid.*
7. The sheriff, on a mortgage debt against A, seized under execution the mortgage property which was in the possession of B, to which B claimed title, and for which a suit was then pending between A and B. *Held*: That the purchaser at the sheriff's sale acquired, not the property, but the rights of A to it. The plaintiff should have proceeded against it by hypothecary action, and could only have had it sold after the demand and other proceedings necessary to render property, in the possession of, and claimed by a third person, liable for a mortgage given by another. *Preston, J. Leverich v. Toby*, 445.
8. J sold lots to W, who recorded his deed. W resold to J, who *did not record his deed*. J, several years afterwards, sold the lots to H, who sold them to T, who sold them to plaintiff, who paid taxes upon them, and assumed in every respect, the responsibilities of possession and ownership. The titles of H, of T, and of plaintiff, were duly recorded. The defendant seized the lots to satisfy a judgment obtained against W, after the plaintiff had acquired title. Plaintiff enjoined the sale. *Held*: The failure of J to record the reconveyance to him, was cured by the subsequent conveyances and possession under them; and the plaintiff's title was valid against the creditor of the original owner, W. *Buchanan v. Morgan et al.*, 454.
9. Defendants purchased property at a sale made to effect a partition, and alleging that there were informalities in the action of partition under which the sale was made, refused to pay the price, and claimed its rescission. The parties interested in the partition, offered to waive the informalities, and, within a reasonable time to be allowed by the court, to ratify the sale. *Held*: The parties in interest could alone object, and it was competent for them to waive the informalities. *Held, also*: That under the authority vested in the court, by article 2042 of the code, leave can be granted to them to waive the errors and ratify the sale within a reasonable time. *Chalon v. Walker*, 477.
10. In this case the plaintiff claimed, under a sheriff's adjudication of the property, by virtue of an order of seizure and sale *via executiva*; the defendants, under a tax collector's sale for taxes. *Held*: That the tax

SALES JUDICIAL. (*Continued*).

sale was null, because the property was not sold for the amount of the special mortgages existing upon it. *Copley v. Hasson*, 593.

11. That the hypothecary action was not necessary, because the defendants were not, at the time of the seizure, in the actual or even civil possession of the property, under the tax sale. *Ibid.*
12. That, as between mortgagor and mortgagee, the property was clearly mortgaged by the *proces verbal* of sale. *Ibid.*
13. A person who buys a lease at a judicial sale, is not entitled to recover rent accruing after the sale, out of the funds produced by the sale. *Gauche v. Trautman*, 610.
14. A party who procures a sale, will not be permitted to complain of any ambiguity in its terms. *Ibid.*
15. Defendant pointed out to the sheriff, for seizure under two executions, property which, he stated at the time, was far more than sufficient to satisfy them. The sheriff seized it under those executions, and under that of plaintiff at the same time. *Held*: We are not prepared to say, that, under the circumstances, the defendant was entitled to notice of seizure. *Thompson v. Barrow*, 669.

## SERVITUDE.

1. The fall of lands fronting on the water courses in Louisiana, is from the river to the swamps behind; the natural drain is, therefore, from the front to the rear, and the right to drain them to the rear by means of ditches, cannot be doubted; but that right should be exercised, so as to cause no injury to others without necessity. The owner of front lands cannot, therefore, by artificial drainage, accumulate the water in the rear of his field in a much larger volume, than if suffered to flow naturally, and thereby impose a more burdensome servitude on the lands of the proprietor below. *Becknell v. Windhal*, 291.
2. The servitude of way never extends beyond the breadths of the street adjoining the property entitled to it. *Rost, J. Xiques v. Bujac*, 498.
3. Where a person owned adjoining lots, and made doors and windows in the wall which divided them, a purchaser of one of the lots, at the succession sale, cannot claim the door and window openings as a right of servitude. The purchaser acquired the wall, in common, and the previous destination *pere de famille*, resulting from the openings, was abrogated by the sale. *Fisk v. Haber*, 652.
4. The servitude of passage claimed, is not a continuous servitude, and could, under no circumstances, result from the destination of the *pere de famille*. *Ibid.*

## SEQUESTRATION.

1. Where the debtor is present and subject to the jurisdiction of the court, his creditor cannot, simultaneously with an action for the recovery of his debt, have a general sequestration of his property, nor restrain him by injunction in the exercise of the rights of ownership. *The United States v. Smith*, 185.
2. When one sues for the possession of real property, in order to obtain a writ of sequestration, he must allege that he has been evicted, through

**SEQUESTRATION** (*Continued*).

violence, or that he has reason to apprehend that the defendant will make use of his possession to dilapidate or to waste the fruits of the property.  
C. P. 275. *Copley v. Bonner*, 578.

3. The proceeding by sequestration is a harsh remedy, and when sued out without sufficient cause, the party whose property is taken should have adequate redress. *Boardman v. Glenn*, 581.

**SHERIFF.**

1. The sheriff charged two dollars per diem for taking care of real property. The district judge reduced the amount to one dollar per diem. The sheriff appealed. The law provides no compensation to the sheriff for taking care of real property. *Held*: The amount allowed was warranted by the evidence. *Townsend v. Palms*, 217.
2. By the Court: It seems to us that, under the constitutional provision, [art. 71] we are not authorized to reverse the judgment of the district court unless we should find it to be contrary to evidence, as in any ordinary action. *Ibid*.
3. When the sheriff finds the judgment too vague and uncertain to enable him to execute a writ of possession, he cannot have recourse to the examination of witnesses. As was held in the case of *Williams v. Kelso*, 7 L. R. 408, that would be a new trial of the case before the sheriff. *Copley v. Bonner*, 578.
4. The sheriff is the proper officer to make a seizure, at the suit of a third party, of money which he has received under execution. The coroner is not competent to make the seizure in such a case. *Purvis v. Breed*, 636.
5. A judgment creditor required the sheriff to execute a *fi. fa.* on certain property, and gave an indemnity bond in favor of the sheriff, in which they and their sureties bound themselves to save him harmless, defend all suits that might be brought against him, and pay all damages and judgments that the sheriff might be made liable for in consequence of the seizure and detention of the goods taken in execution. A person who claimed the property, sued the judgment creditors and sheriff for damages on account of the seizure. The judgment creditors employed counsel to defend the suit. *Held*: The sheriff had a right to select his own counsel, and under the bond, the judgment creditors and the securities on the bond were liable for the payment of the fee. *Stewart v. Lapsley*, 641.
6. The plaintiff obtained an attachment against the defendant, but the sheriff did not take actual possession of the property under the writ, and no act of possession by him or his successors is shown, for five years after its return. About five years after that time, the attaching creditor had a curator *ad hoc* appointed to defendant, obtained judgment, and seized the lots under an execution. In the meantime, and within two years from the date of the attachment, defendant sold the property, and it passed into the hands of purchasers who were ignorant of the attachment. *Held*: The law required that the sheriff should have seized and detained the property; that he and his successors should have taken charge and kept possession of it; and for the failure of *Goodrich*, the attaching credi-

**SHERIFF (Continued).**

tor, to have seen this done, and to have prosecuted his suit with diligence, innocent purchasers of the property should not suffer.

*Goodrick v. Pattingill*, 664.

7. Sheriffs must seize actually, and not fictitiously, where the law requires; and third persons must not suffer by their neglect to do so. *Ibid.*

**SHIPPING.**

1. The bark *Tennessee*, on her arrival in New Orleans from Marseilles, delivered a number of casks of wine which had been damaged by grease and water. She had previously carried a cargo of lard to Marseilles, and after discharging, was scraped and limed. On her voyage to New Orleans, she encountered stormy weather, which caused her to leak. *Held*: That the vessel was liable for the damage caused by the lard, but not for that caused by the water. *Tennessee v. Tardos*, 28.
2. In case of shipwreck, where the cargo is in condition to re-ship, and where the means of transportation can be procured within a reasonable time, the master has no legal right to sell; it is his duty to forward the cargo to its port of destination. *Rugely v. Sun Mutual Insurance Co.*, 279.
3. Where there is a legal justification for the master to sell the cargo, yet it is his duty to give such notice as will warn the public of the time and manner of the sale. *Ibid.*
4. In ordinary cases, a captain signing a bill of lading, is considered as signing as the agent of the owners of the vessel, and being an act done within the scope of his authority as master, his contract is binding upon the owners. The contract, under the bill of lading is, to transport the goods safely to the place of destination, and there deliver them to the consignees or their order. This duty must be performed, unless its performance be prevented by the happening of the excepted perils. If, under the pressure of extreme necessity, a sale of the cargo becomes necessary, still, the proceeds of sale, after deducting the contributive share for general average and other lawful charges, must be accounted for, to the owners of the goods, by the captain and owners of the vessel. *Slark v. Broom*, 337.
5. A bill of lading, by legal implication, announces the liability of the owner of the ship, and this liability cannot be excluded by an extrinsic fact, not communicated to the shipper. Where, therefore, the shipper received bills of lading in the usual form, in the absence of evidence to the contrary, he may justly be considered as looking to the usual responsibility, to wit, that of the captain, the ship and the ship-owner. *Ibid.*
6. By the Court: "We think it clearly results, that it (the charter party) was a contract to carry, for a stipulated reward, all such goods up to the extent of the ship's capacity, as the charterer should furnish, and such passengers, up to a certain number, as he could furnish; but that the possession, command and navigation of the ship, remained in the owners, through the masters and mariners appointed and paid by them; and that the responsibility for the safe delivery of the cargo, saving such losses as might arise from excepted perils, rested upon the master and the owners." *Ibid.*
7. Where, therefore, the vessel was stranded, and the master sold the cargo, and appropriated a part of the proceeds for the maintenance of the passen-



SHIPPING (*Continued*).

gers, and for their transportation, under what he regarded the authority of the passenger's act of 12 and 13 Victoria, it was held, that the ship-owner was liable to the freighter. *Ibid.*

8. A vessel had made a safe voyage from Turk's Island to New Orleans. *Held*: That it was not necessary for the plaintiff to show, affirmatively, that she was seaworthy, and provided with men and provisions, and every other requisite for such a voyage. *Stackpole v. Wickham*, 678.

See Insurance—*McDowell v. Sun Mutual Insurance Co.*, 684.

See Damages—*Pearl River Navigation Co. v. Douglass*, 631.

## SLAVES AND SLAVERY.

1. The temporary residence of a slave, even with the consent of the master, in a foreign country, does not entitle the slave to freedom after his voluntary return with the master to a State where slavery exists.

*Liza, c. w. v. Puissant*, 80.

2. Although the master of a slave may have lost his right of dominion over him, by receiving from him a sum of money for his emancipation, and by permitting him to enjoy his liberty for more than ten years; the act of emancipation, passed according to the forms of law, can alone give the slave the *status* of a free man, which he must have before he can prosecute in a court of justice, any claim, except his claim for freedom.

*Baker, f. m. c. v. Tabor*, 556.

3. He may appear in court to claim his freedom before emancipation.

*Ibid.*

4. The master may claim, in his own name, the benefit of any contract, and the damages resulting from the breach of any contract entered into by the slave, not emancipated according to the forms of law. *Ibid.*

5. The right of the master to claim the services of his slaves may cease, but his duty to protect them, terminates only with their life. *Ibid.*

See Damages—*Williamson v. Norton*, 393.

See Sale—*Carmelite v. Lacaze*, 629.

## STATUTES.

1. Previous to the act of March 10th, 1852, our laws expressly prohibited every person from practising the profession of a physician or apothecary, or that of midwifery, without a special license granted by the medical board, or a diploma from the University of Louisiana, and imposed a fine upon all persons so offending, for the benefit of the Charity Hospital.

*Quarles v. Evans*, 543.

2. The act of March 10th, 1852, authorized any person with a diploma from a chartered medical college in the United States, to practice medicine without license, and to charge, demand, and receive fees for visits, &c.: and repealed the prohibiting and penal laws not consistent therewith.

*Ibid.*

3. The repeal of a penal statute prevents a penalty or fine from being enforced, but does not render a contract made in defiance of law valid, nor does it give any right of recovery on such a contract. *Ibid.*

STATUTES (*Continued*).

4. The unrepealed proviso of sec. 4th of the act of the 18th March, 1816, only relieves the person coming within it, from the fine or penalty declared in the act. *Ibid.*

See Parish of Claiborne—*Wager v. Wager*, 541.

See Criminal Law—*City of New Orleans v. Miller*, 651.

See Criminal Law—*State v. Cassidy*, 373.

## SUBSTITUTIONS AND FIDEI COMMISSA.

1. There is neither a substitution, nor *fidei commissum*, in a will to the following effect: "In consequence of the affection I bear to my grand niece, A, a child whom I have brought up, and who has always taken care of me, I give and bequeath the whole of my property, after my debts are paid, willing that, at my decease, my executor shall put the said legatee in possession of my land and slaves; that the whole shall be administered and preserved in kind by my executor, for the best interests of the said legatee, until she shall have attained the age of majority, or have married." The evidence showing, that the legatee was of age when the testatrix died. *Major v. Esnault*, 51.
2. The trust, created by the testator, was not uncoupled with an interest; the trustees and their descendants, all had a direct interest in the bequest. The effect of such a bequest is not merely to create a perpetuity; it contains an indefinite series of prohibited substitutions. *Rost, J.*  
*Succession of Franklin*, 395.
3. The bequest, by *Franklin*, to his brothers and their heirs, forever, in trust, of certain property, the revenues to be employed in establishing and maintaining an academy, in Tennessee, to be superintended by the magistrates of Sumner county, and their successors in office, &c., &c., establishes a tenure of property unknown to the laws of Louisiana, highly inconsistent with their spirit, creating an entail, and substantially involving, in a very aggravated form, a prohibited *fidei commissum* and substitution. *Slidell, J.* *Ibid.*
4. A trust, as attempted to be created by this will, is a right in equity, to the beneficial enjoyment of lands and slaves, of which the legal title is in another person. I am not aware of any trust created in Louisiana, which has been recognized as a legal tenure adversely to third persons having an interest. *Eustis, C. J.* *Ibid.*
5. The framers of our code never contemplated to abolish naked trusts, uncoupled with an interest, which were to be executed immediately. *Eustis, C. J.* *Ibid.*
6. A man has no more power to create new, or prohibited modes, of conveying property by will, than he has by sale, or by donation *inter vivos*. Between parties, they may hold their property, by any tenure or terms they please; but, as to the establishment of titles affecting the property itself, there is no power in man, out of the law; nor has society any interest in attempting to carry into effect the conceits of the dead, to the disturbance of the rules of public order and policy which regulate the living. *Eustis, C. J.* *Ibid.*
7. The term, substitution, embraces the ownership, and not the administration of property. It implies, that one should hold the property for

SUBSTITUTIONS AND FIDEI COMMISSA (*Continued*).

another, during life, and transmit it to him at his death. It is very similar, in its effects, to the entail of the English law. To constitute a substitution, the donee must be charged to preserve the property until his death, and then return it to the substituted heir or legatee. *Franklin* did not give the third of his property to his brothers, under a charge to preserve and return it to their heirs. His brothers, and their heirs, were merely appointed to take charge of, and administer it, for the seminary of learning, in Tennessee. *Preston, J.*, dissenting. *Ibid.*

8. A *fidei commissum*, is created, where property is given to one, for another, to vest in the latter, immediately, at a given period, or upon a condition. The will does not contain a *fidei commissum*, because the property was not given by *Franklin* to his brothers, for the literary institution, but was given to the institution itself; and, the title remained in the succession of *Franklin*, until the seminary was incorporated. *Preston, J.*, dissenting. *Ibid.*
9. Article 1507 of the Civil Code, when adopted in the code of 1808, was not intended to introduce new principles of law into Louisiana, but merely to recognize the existing law; and no other than substitutions, and *fidei comissa*, previously unlawful, were prohibited by it. *Preston, J.*, dissenting. *Ibid.*
10. Substitutions, which changed the order of descents, and fostered pride and laziness, and, abstracted property from commerce; and, *fidei comissa*, by which one held property for another, who was incapable of receiving, or for an unlawful purpose, which were prohibited by the law of Spain, in force in 1808, were the substitutions, and *fidei comissa*, which the jurisconsults, who framed the code, declared *are*, and *remain*, prohibited. *Preston, J.*, dissenting. *Ibid.*

## SUBROGATION,

1. Where the endorser pays a judgment, which has been rendered both against himself and the drawer, he is subrogated by law to the rights of the judgment creditor. C. C. 2157. *Succession of Dorsey*, 34.
2. It is not necessary for the assignee of a claim to affix her signature to the act of assignment and subrogation; the institution of a suit upon the act is a sufficient acceptance of it. *Brusle v. Thomas*, 349.

## SUCCESSION.

1. The interest of the mother in the estate of her deceased child must be governed by articles 899, 900 of the Civil Code which treat of inheritance, and not by article 1481, which treats of donations. That interest, therefore, is one-fourth and not one-third of the child's estate. *Grover v. Clarke*, 179.
2. A part of the heirs cannot claim to be put in possession of the entire estate, to the exclusion of the other heirs, on the ground that the latter were indebted to the deceased at the time of his death, in an amount exceeding their share in the succession. *Turner v. Turner*, 216.
3. Creditors of a succession ought not to be delayed, after the brief interval prescribed by the law for the payment of their claim, on the ground that the interest of legatees would be benefited by doing so. On the applica-

SUCCESSION (*Continued*).

tion of a creditor who is unnecessarily delayed, the court will order a sale of property to pay the debt.

*Union Bank v. The Executors of McDonogh*, 231.

4. By the Court: As the estate is admitted on all hands to be enormously rich, there seems no objection to providing for the payment of this particular creditor, without directing the usual formality of a tableau of distribution. *Ibid.*
5. Until the universal legatee makes himself a party to the suit, the act of the executor in defending it, is binding upon the former.  
*Coulter v. Cresswell*, 367.
6. Special legacies are not to be paid out of the portion of the forced heirs; and, where a sum is given by the husband to the wife, in lieu of her interest in his succession, it is a charge upon his general estate. *Preston, J.*, dissenting.  
*Succession of Franklin*, 395.
7. An error in an inventory of the effects of a succession, may be corrected.  
*Succession of Pipkin*, 617.

## SUPREME COURT.

1. There are some things, that pass before the eye of a district judge, which cannot be preserved in evidence, and I will not disregard entirely the impressions arising from them when, in his written opinion, they are declared. *In the Matter of Celina, Cyrot Gentes, Opponent*, 162.  
*Per Slidell, J. Eustis, C. J.*, concurring.
2. I cannot consider the appearance (conduct and manner) of *Gentes*, in the district court, as it is not presented in the form of testimony. *Ibid.*  
*Per Preston, J. Rost, J.*, concurring.
3. The Supreme Court will not grant a *mandamus*, where it does not appear that the subject matter, with respect to the amount involved, falls within its jurisdiction.  
*State v. District Judge of the Parish of Jefferson*, 184.
4. Where the interest of the applicant appeared to be less than three hundred dollars, the Supreme Court refused to entertain an application for a *mandamus*.  
*State v. The Judge of the Fifth District Court of New Orleans*, 289.
5. The petition charged that the plaintiff sold and delivered property to the defendant for cash, and that defendant removed, disposed of, or concealed, or covered the same in such a manner, that plaintiff could not render said property liable for the price. It prayed, also, for his arrest and punishment. The jury gave judgment for the sum claimed, but dismissed the charge of fraud. By the Court: This is a civil remedy, of such a highly penal character that we should never feel authorized to convict the debtor of the fraud, and punish him with imprisonment, which might extend to three years, without the verdict of a jury. And, although we may remand the cause for a new trial, if any errors of law had occurred in the progress of the trial, we are unable to do so for differing with the jury as to the effect of the evidence alone.  
*Thompson v. Chapman*, 257.
6. The Supreme Court will, if possible, avoid coming in conflict with the district courts, by writs immediately directed to them to perform their duties.  
*State v. Roger*, 382.

SUPREME COURT (*Continued*).

7. In this case the defendants' officers had neglected the defence; the trial was *ex parte*; the right of the plaintiff to recover doubtful. The cause was therefore remanded. *Hassard v. Municipality No. 2*, 495.
8. This court cannot, upon an appeal, reexamine the decision of a district judge upon a question of fact, such as whether due diligence has been used to procure the attendance of a witness. *State v. White*, 531.
9. The Supreme Court seldom interferes with verdicts on questions of fact. *Gandy v. Taintor*, 540.
10. When a continuance is refused by a district judge, the Supreme Court will not disturb the judgment rendered, even when the correctness of the particular ground on which the judge *a quo* placed his refusal, is doubtful, provided the court be satisfied that there was another valid ground for the refusal of the continuance, presented by the party opposing it. *Vaiden v. Abney*, 575.
11. Plaintiff has the right to offer evidence to rebut the plea of prescription, and when the plea is filed in the Supreme Court, the cause will be remanded for a new trial. *Suydam v. Kinney*, 621.

SURETY.

1. The plaintiffs were the sureties of an executor in the State of Arkansas. They took steps there to be relieved from their suretyship, upon which the executor placed in their hands, as an indemnity, several of the slaves belonging to the succession. He afterwards fraudulently obtained possession of the slaves, and sold them fraudulently to the defendant. *Held*: 1st. That the sureties had such a right in the property, as to maintain an action, against mere spoliators. 2d. That they, also, had the right to maintain an action, as against the defendants, upon a forfeited bond for the delivery of property sequestered, although there had been administrators appointed for the succession, both in Arkansas and Louisiana. *Johnson v. Imboden*, 110.
2. *Garland* was arrested. He was released on giving bail bond, with *Beach* as his security, conditioned that he should not depart from the State for the term of three months, without leave from the court. *Garland* left the State without the leave of the court and within the term, but returned shortly after its expiration. The question was, whether the surety was bound. *Fonda v. Beach*, 213.
3. *Preston, J.*, held, that the surety was discharged, on the ground that the bond was not intended to prevent a temporary absence, but a permanent departure by the debtor, without making a surrender of his property. *Ibid.*
- Slidell, J.*, concurred in the decree of *Preston, J.*
4. *Eustis, C. J.*, with whom *Rost, J.*, concurred, held, the surety was bound, the condition of the bond being broken. *Ibid.*
5. A surety on such a bond, after its condition has been broken, and after judgment has been rendered against the principal, cannot be allowed to falsify the affidavit under which the proceedings were instituted. *Ibid.*
6. The neglect of one officer of the State to do his duty, does not excuse the defalcation of another or discharge his securities.

*Duncan v. State of Louisiana*, 377.

SURETY (*Continued*).

7. A suit against the sureties upon an administrator's bond will be dismissed unless there be a judgment against the administrator, or he be made a party defendant. *Phelps v. Sawyer*, 551.
8. This suit was brought against the sureties upon an appeal bond. *Per Curiam*: The appeal was dismissed because there was no legal order of appeal which, in legal intendment, is equivalent to no order at all; and without such an order, the clerk had no authority to take the bond. The maxim, that in whatever manner a man binds himself, he shall remain bound, is not applicable to a case of this kind. *Sears v. Bearsk*, 539.
9. The liability of sureties upon judicial bonds, is fixed by the law which authorizes the taking of the bonds. *Ibid.*
10. Plaintiff was one of the two sureties upon a note made in Georgia, and placed in the hands of a trustee. He afterwards paid the note and brought this suit against his co-surety and the maker of the note. *Held*: That, the plaintiff having paid, without being sued, and without informing the principal debtor, no equity exists in his favor; and the case must be determined as if the trustee himself was seeking to enforce the trust against the defendants. C. C. 3025. *Gates v. Renfro*, 569.
11. A surety upon a delivery bond taken under the statute of 1842, may avail himself of the defect, that there was no seal of the court upon the execution in the hands of the sheriff at the time the bond was taken. *King v. Baker*, 570.
12. A surety upon such a bond may avail himself of all the means of defence of his principal, which do not result from the condition or personal incapacity of the principal. *Ibid.*
13. A surety cannot be bound, as a general rule, under more onerous conditions than his principal. *Ibid.*
14. The rule that, in whatever manner a party chooses to bind himself, he shall be held to be bound, does not apply to judicial bonds. In such cases a sheriff has no power to take any other bond than that which he is authorized by law to take. *Ibid.*
15. The bond of a sheriff and State tax collector is not a bond for a sum of money, but a bond for the performance of official duties, and if the duties are not performed, each of the sureties is bound to the full amount for which they have obligated themselves. *Copley v. Dinkgrave*, 595.
16. The 6th section of the Act of 1847, providing that in no case securities shall be liable for each other, or beyond the amount for which each one may obligate himself in the bond, is very far from saying that they shall not, in every case, be bound for that amount. *Ibid.*
17. If the obligation of each surety is to be ascertained without regard to that of the others, they stand, so far as the State is concerned, as if only one of them had signed the bond, and in that case the party signing would be liable to the full amount of his obligation. *Ibid.*
18. The sureties upon the bond of a collector of taxes, cannot avail themselves of any fraud committed by him. *Ibid.*
19. There is nothing in the act of 1847 suspending the operation of the penalty which it imposes on collectors of State taxes, who fail to account. *Ibid.*
20. The 63d section of the Act to provide a revenue for the support of the Government of the State, ordains, that if any tax collector shall

**SURETY** (*Continued*).

neglect or fail to pay into the treasury the amount due by him, and to obtain the treasurer's receipt therefor, he shall forfeit the commission allowed to him by law. *Ibid.*

21. An agreement to give time to the principal, which will discharge the sureties, under the laws of Mississippi, must be a positive and binding agreement, with the principal, for a definite time, based upon a valuable consideration, sufficient to tie up and restrain the creditor during the time for which the indulgence is given; and the consideration must be such that it can be enforced in a court of justice.

*Bacon v. Dalgrean*, 599.

22. Where the principal debtor is discharged the surety is also discharged. *Preston, J.* *Ibid.*

23. A surety on a note, when sued in Louisiana, cannot defeat the action by showing that the principal debtor had sustained a plea of the statute of limitations, to an action brought on the same note in Mississippi. *Ibid.*

24. A surety, in exercising his right to point out for discussion, the property of the principal debtor, is not restricted to the property within the jurisdiction of the court that rendered the judgment. He may point out any property having the requisite conditions, within the limit of the State.

*Hill v. Miller* 621.

25. A creditor ought not to be subjected to a troublesome, difficult, and protracted discussion of the property of the principal. The law supposes, that the property designated is in a condition to be made available to the creditor for the payment of his debt. *Ibid.*

26. A surety who requires the creditor to discuss property, must describe it so particularly as to enable the creditor fully to understand its situation, extent, title, and condition. *Ibid.*

27. The plea of discussion can be made but once. *Ibid.*

28. The plaintiff leased his steamboat by public act, in which, as additional security for the performance of the stipulations of the lessees, the parties annexed and made a part of the act, a bond, signed by the lessees, with *B.* and *M.* as securities. The condition of the bond bound the obligors to some, but not to all of the obligations of the lessees, resulting from the lease. The owner of the boat sought to bind the securities on the bond for a non-compliance with the stipulations of the lease, some of which formed no part of the obligations resulting from the bond. *Held*: It is true that the lease and the bond were executed at the same time; but, as the same parties did not sign both, they cannot be viewed as one contract in relation to the sureties, who only signed the bond. The declaration of the lessees, in the contract of lease, cannot prejudice their sureties, who can only be held bound as they agreed to bind themselves.

*Harrington v. Nichols*, 676.

See Taxes and Tax Collector—*State v. Hayes*, 118.

**SURVEYOR.**

1. A surveyor ordered to trace a line under a former survey, is bound to follow it, without regard to title papers, or the variations of the compass.

*Frederick v. Brulard*, 655.

## TAXES AND TAX COLLECTOR.

1. Where a tax collector had obtained the assessment roll from the recorder of mortgages, for one year, without having settled for the preceding year, his sureties are not released from their liability on account of the neglect of the recorder of mortgages. *State v. Hayes*, 118.
2. The sureties of a tax collector are bound for the penalty of two per cent per month, imposed upon defaulting tax collectors. *Ibid.*
3. The exigencies of government require that the process for the collection of taxes, should be summary. They are to be regarded not as a debt, to be enforced against the debtor who contracted it, by judicial proceedings but a contribution required from the citizen for the support of government, and for the protection and benefit of all.  
*Union Tow Boat Company v. Bordelon*, 192.
4. The bond of a sheriff and State tax collector is not a bond for a sum of money, but a bond for the performance of official duties, and if the duties are not performed, each of the sureties is bound to the full amount for which they have obligated themselves. *Copley v. Dinkgrave*, 595.
5. The 6th section of the Act of 1847, providing that in no case securities shall be liable for each other, or beyond the amount for which each one may have obligated himself in the bond, is very far from saying that they shall not, in every case, be bound for that amount. If the obligation of each surety is to be ascertained without regard to that of the others, they stand, so far as the State is concerned, as if only one of them had signed the bond, and in that case the party signing would be liable to the full amount of his obligation. *Ibid.*
6. When there is no separate book kept by the recorder of mortgages to record sheriff's bonds, recording the bond in the book of mortgages will be sufficient notice, under the Act of 1847. *Ibid.*
7. The 46th section of the Act to provide for the support of the government of the State, provides, that the bond of the collector of taxes shall operate as a legal mortgage on the lands and slaves of the collector. This act attaches the mortgage to the bond itself, and as it is silent as to the manner of recording that mortgage, the usual mode of inscription, in the book of mortgages, will be sufficient. *Ibid.*
8. The sureties upon the bond of a collector of taxes, cannot avail themselves of any fraud committed by him. *Ibid.*
9. There is nothing in the Act of 1847 suspending the operation of the penalty which it imposes on collectors of State taxes, who fail to account. *Ibid.*
10. The 63d section of the Act to provide a revenue for the support of the government of the State, ordains, that if any tax collector shall neglect or fail to pay into the treasury the amount due by him, and to obtain the treasurer's receipt therefor, he shall forfeit the commission allowed to him by law. *Ibid.*

## TRUST ESTATES.

1. The testator, a citizen of Tennessee, conveyed immovable property, situated in Louisiana to his brothers, forever, in trust; the revenues to be employed in establishing and maintaining an academy in Tennessee, as particularly set forth in the will. He directed also that, after the death



# TRUST ESTATES (*Continued*).

of his brothers, (the trustees,) the trusts should be continued, and pass over forever in the heirs of his said brothers, to pass the estate ; and that the magistrates of the county court of the county of Sumner and State of Tennessee, and their successors in office, should be thereafter the perpetual superintendents of the aforesaid seminary. *Held*: The testator's intention, in this case, was to create a perpetuity, and, as to Louisiana, a new tenure of property ; that intention is a legal impossibility, and the disposition falls. *Succession of Franklin*, 395.

2. It is impossible to recognize trust estates in Louisiana, without letting in all the laws which regulate that peculiar tenure of property ; and the Constitutional inhibition to the Legislature to adopt any system of foreign laws, by general reference, would be rendered nugatory, if courts of justice assumed the power to introduce those systems by piecemeal, in this insidious manner. *Rost, J. Ibid.*
3. Under the hypothesis that the words, "in trust," in this case, should be reputed not written, the title must have vested in the original trustees in full ownership, and, if it did, the charge to preserve and return the property to other persons after them, would be such a substitution as would avoid the entire disposition. *Rost, J. Ibid.*
4. A trust, as attempted to be created by the will of Franklin, is a right in equity, to the beneficial enjoyment of lands and slaves, of which the legal title is in another person. I am not aware of any trust estate created in Louisiana, which has been recognized as a legal tenure adversely to third persons having an interest. *Eustis, C. J. Ibid.*
5. The framers of our code never contemplated to abolish naked trusts, uncoupled with an interest, which were to be executed immediately. *Eustis, C. J. Ibid.*
6. Trusts are unknown to our laws, and the only cases in which they have ever been enforced by our courts, are those of marriage settlements, which, so far as they create no new tenure of property, have been, by comity, assimilated to marriage contracts. *Gates v. Renfro*, 569.

See *Sale—Terrell v. Allen*, 46.

## TUTOR.

Sums paid by a tutor, in the course of his administration, are considered *prima facie* as proper charges against the minor he represents. Where there are circumstances which cast a suspicion upon his good faith, it is otherwise. *King v. Bowen*, 151.

See *MINORS*.

## VENDOR AND VENDEE.

See *Sales—George v. Roach*, 594 ; *McCandlish v. Kirkland*, 614 ; *Carmelite v. Lacaze*, 629.

## WARRANTY AND OF THE CALL IN WARRANTY.

1. The call in warranty is not a dilatory exception, but an incidental demand in the answer, to enforce a legal right of the defendant. *Smith v. McWaters*, 145.

WARRANTY AND OF THE CALL IN WARRANTY (*Continued*).

2. Calling a non-resident warrantor in warranty, through a curator *ad hoc*, has no more substantial effect than if he were notified by the defendant; for the judgment against the curator *ad hoc* would not be absolutely binding upon the warrantor, in another State, unless he authorized the curator to defend the suit. *Ibid.*
3. By the Court: We would not be understood as disapproving of the practice of the appointing a curator *ad hoc* to an absent warrantor; the power may be fairly inferred from the articles of the Civil Code and Code of Practice, providing for the prosecution of suits against absentees. Therefore, if a judge struck out a call in warranty of a non-resident defendant, and thereby the defendant lost any substantial advantage, the Supreme Court would remand the case, and have the call in warranty reinstated. *Ibid.*
4. The laying out of a road, and the establishment of a ferry, are acts of sovereignty which do nobody harm. No warranty or obligation to indemnify ever arises from them, without an express stipulation to that effect. *Gillespie v. Freeman*, 350.
5. He who sells a debt or an incorporeal right, warrants its existence at the time of the transfer, though no warranty be mentioned in the deed. *Jenkins v. The Parish of Caddo*, 559.
6. Even in case of stipulation of no warranty, the seller, in case of eviction, is liable to a restitution of the price, unless the buyer was aware at the time of the sale of the danger of eviction, and purchased at his peril and risk. *Ibid.*
7. In civil matters one must be sued before the judge having jurisdiction over the place where he has his domicile. But in matters relative to warranty, the warrantor may be brought before the court having cognizance of the principal action in which the demand in warranty arises. *Oliver v. Bry*, 590.
8. One may be called in warranty in a personal action. C. P. 378, 379. *Ibid.*

## WILLS.

1. A nuncupative will under private signature, attested by only three witnesses, when there were four persons present, and others in the vicinity who might have been obtained as subscribing witnesses, is invalid. *Ratliff v. Ratliff*, 117.
2. Where two clauses in a will are inconsistent, the latter is considered as the will of the testator. C. C. 1716. *Succession of Boone*, 127.
3. The words "lawful heirs," in a will, refer to heirs of the half as well as of the whole blood, and evidence cannot be received to show that testatrix only meant a portion of her heirs at law. The admission of such evidence would virtually defeat the prohibition to make verbal testaments. *Sharp v. Klienpeter*, 264.
4. When the words of the testamentary disposition are sufficient to vest a legal title in the legatee, and the intention of the testator to create such a title for his benefit, to the exclusion of the heirs at law, and of all other persons, is ascertained, then, in furtherance of that intention, any illegal or impossible condition the disposition may contain, is presumed to have

WILLS (*Continued*).

been inserted inadvertently, and is reputed in law, not written; but, where the title, created by the will, as ascertained by the words used, and the intention of the testator, is a tenure of property which our laws do not recognize, the attempt to change the nature of it, and to convert it into a title, valid under our laws, would no longer be an interpretation of the will, but the making of a new will for the testator. *Rost, J.*

*Succession of Franklin, 395.*

5. I put this case upon the principle, that, where the condition is of the essence of the title created by the bequest, and intended by the testator, so that the will cannot stand without it, if that will be one which the law does not recognize, courts of justice cannot replace it by another, and the disposition must fall. *Rost, J. Ibid.*
6. A testament is a law, and the first duty of courts, in this as in other laws, is to ascertain the *mens legislatoris*; when it is once ascertained beyond reasonable doubt, it must be followed, and the disposition stands or falls, as the intention of the testator can, or cannot be carried into effect, consistently with the rules of law. *Rost, J. Ibid.*
7. Powers given to testators by the code, are exceptions to the general law regulating the devolution of property; they are limited, both as to form and substance; and it is not enough to say, that perpetuities are not prohibited, it should be shown that they are authorized. *Rost, J. Ibid.*
8. A man has no more power to create new, or prohibited modes, of conveying property by will, than he has by sale, or by donation *inter vivos*. Between parties, they may hold their property, by any tenure or terms they please; but, as to the establishment of titles affecting the property itself, there is no power in man, out of the law; nor has society any interest in attempting to carry into effect the conceits of the dead, to the disturbance of the rules of public order and policy which regulate the living. *Eustis, C. J. Ibid.*
9. There is, in our code, but a single restriction upon dispositions in favor of a stranger, and that is, where the laws of his country prohibit similar dispositions from being made, in favor of a citizen of this State. Art. 1477. There is no prohibition, of a disposition in favor of a foreign State, or corporation created by it. *Preston, J., dissenting. Ibid.*
10. A testator may make every disposition of his property by donations *mortis causa*, which he could make by donations *inter vivos*. Unless the law prohibits a testamentary disposition, the testator may make it, if it do not violate some rule of morality or duty. *Preston, J., dissenting. Ibid.*
11. The bequest of the interest of a fund in perpetuity, when the naked property in the fund is given to no one else in express terms, is evidence of the intention of the testator to bequeath the fund itself; and the meaning of the words used, should be ascertained with reference to that intention. *Peale v. White, 449.*
12. If the deceased was a resident of England, transiently passing through our country, the disposition of his personal property, according to the laws of England, would be valid; but if the deceased was domiciliated in Louisiana, his personal property was domiciliated here with him, consequently he was obliged to dispose of it according to the laws of this State. *Ibid.*

WILLS (*Continued.*)

13. The notary concluded the will thus: "This will has been dictated to me by the sieur *Macarty*, and I, the said notary, have written the whole in my hand, such as it has been dictated to me by the said testator, in the presence of the witnesses hereafter named and undersigned," &c. The question being, whether the words need import that the will was dictated in the presence of the witnesses, or was only written in their presence. *Held*: The words, in the presence of the witnesses hereafter named and undersigned, in this connection, would apply indiscriminately to the whole clause—to the dictation as well as to the writing.

*Nelder v. Macarty*, 484.

14. When the father, by will, in favor of a natural child, disposes of the portion of his estate permitted him by law to dispose of, the only restraint which the law imposes on the rest of his property is, that the disposition of it be not in favor of any other persons than legitimate relations or a public institution.

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## WITNESSES.

1. Where an agent has purchased property for his principal, which has been seized by a creditor of the agent as his own property, in a contest between the principal and the seizing creditor, the agent is a competent witness to prove his agency, and that the property belongs to the principal.  
*McLeod v. Frost*, 50.
2. A mere defect of hearing or of sight, does not render a person incompetent to be a witness to a nuncupative will.  
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3. A party introducing a witness to impeach the testimony of another witness, is not restricted to the simple inquiry as "to the general character of the witness for truth and veracity;" he may inquire into the general character of the witness, whose testimony is sought to be impeached, but cannot inquire into any particular acts of immoral character which may have been committed by the impeached witness.  
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*Lapeyre v. Thompson*, 218.

That portion of the statute of 1840, abolishing imprisonment for debt, which subjects the defendant to imprisonment for giving an unjust preference, only until he pays the debt, partakes of a civil character. It merely excepts that case from the law to abolish imprisonment for debt, and, as to it, still allows imprisonment as a civil remedy.

*Thompson v. Chapman*, 257.

In a contest for the ownership of slaves, the plaintiff's title was sustained. He died, and his curators brought suit for the wages of the slaves, and also for the value of those that were not delivered. Plaintiffs had judgment, which, on appeal, was affirmed. The slaves were delivered to defendants on their giving a forthcoming bond. *Held*: That this circumstance did not affect defendants' rights in relation to the slaves.

*Botts v. Nichols*, 263.

A reward for the conviction of a person who may have been concerned in the commission of a crime, refers to a crime already committed, and not to one which may be committed subsequent to the offer.

*Cornelson et al v. Sun Mutual Insurance Co.*, 345.

A reward for the conviction of a person who may have been concerned in the perpetration of a specific crime, cannot be recovered, by the informant, for a conviction of a person of a crime less in degree and entirely different.

*Ibid.*

Where property was sold under execution, according to a plan made by the defendant, which proved to be defective; and a number of the purchasers had a new plan made, which they adopted; it was held, that this new plan did not bind the purchaser, who was not a party to it.

*Massey v. Herman*, 353.

Where one of the several parties must suffer, the loss should fall on that party who, by his imprudent confidence, has enabled the wrong-doer to get credit with innocent third persons, to which, upon the true, but hidden state of facts, he would not be entitled. *Slidell, J.*

*Campbell v. Penn*, 371.

It is not sufficient for the plaintiff to make out a probable case, he must make it certain. And where the suit is delayed until after the death of the person against whom the claim is alleged to have existed, and where if it existed at all, it must have been known in his lifetime, the testimony should be peculiarly strong.

*Simpson v. Powell*, 555.

The court understands that, in Alabama, it is requisite to relief in chancery, by opening a judgment, that the complaint should show that the judgment is unjust.

*Kyle v. Vanbibber*, 575.

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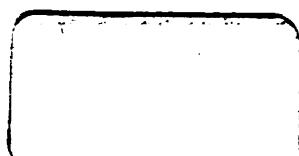












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